THE CASE FOR A NEW BRANCH OF *LEX MERCATORIA* IN TRADE FINANCE: A DISPUTE RESOLUTION PERSPECTIVE

VOL I

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This thesis will argue for the existence of *lex documentaria commercium* as a separate branch of *lex mercatoria* in the area of trade finance, which is capable of providing an efficient framework for the regulation of documentary instruments. It will be shown that *lex documentaria commercium* conforms to the non-exhaustive criteria (identified through the analysis of similarities among other branches of *lex mercatoria,* such as *lex sportiva, lex maritima, lex informatica* and *lex petrolea*) to be recognised as a distinct branch of the modern law merchant.

In particular, it has its own unique principles, most notably the autonomy of a documentary instrument and the principle of strict compliance. There is also a leading private industry association, the International Chamber of Commerce (the ICC), which is responsible for trade finance regulation development, its global promotion and codification of existing industry practices. Moreover, the ICC attracts unconditional support from states and the international community for such activities.

Of pivotal importance is that *lex documentaria commercium* can be consistently and coherently developed and applied through an industry-specialised dispute resolution service, the Documentary Instruments Dispute Resolution Expertise (DOCDEX). As will be demonstrated, conflict resolution in the branches of *lex mercatoria* has some unique features, such as reliance on past precedents, publication of dispute outcomes, significant dependence on existing and the development of new industry-specific principles, customs, usages and/or practices. DOCDEX, in addition to settling documentary instruments' disputes exclusively on the basis of trade finance usages and practices, also encompasses all these features and therefore should be considered as the prime dispute resolution forum for *lex documentaria commercium*.

Key words: alternative dispute resolution, law merchant, International Chamber of Commerce, Documentary Instruments Dispute Resolution Expertise, international trade

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TABLE OF ABBREVIATIONS AND ACRONYMS

AAA	The American Arbitration Association
ACDR	The Arab Center for Domain Name Dispute Resolution
ADNDRC	The Asian Domain Name Dispute Resolution Centre
BIMCO	The Baltic and International Maritime Council
CAC	The Czech Arbitration Court Arbitration Center for Internet Disputes
CAS	The Court of Arbitration for Sport
CIF	Cost, Insurance, and Freight Incoterm
CISG	The United Nations Convention on Contracts for the International Sale of Goods 1980
CMI	The Comite Maritime International
COGSA	The Carriage of Goods by Sea Act (USA)
DOCDEX	Documentary Instruments Dispute Resolution Expertise
DOCDEX Rules	The ICC Rules for Documentary Instruments Dispute Resolution Expertise
eUCP	The Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentation
EUR	The euro
eURC	The Uniform Rules for Collections Supplement for Electronic Presentation
FIBA	The International Basketball Federation
FIDIC	The International Federation of Consulting Engineers
FIDIC	The International Federation of Consulting Engineers
FIFA	The Fédération Internationale de Football Association
FOSFA	The Federation of Oils, Seeds and Fats Associations
GAFTA	The Grain and Feed Trade Association
HKIAC	The Hong Kong International Arbitration Centre
IAAF	The International Association of Athletics Federations
IBA	The International Bar Association
ICANN	The Internet Corporation for Assigned Names and Numbers
ICC	The International Chamber of Commerce
ICLOCA	The International Center for Letter of Credit Arbitration
ICS	The International Chamber of Shipping
ICSID	The International Centre for Settlement of Investment Disputes
IMO	The International Maritime Organization

INCOTERMS	The International Commercial Terms
IOC	The International Olympic Committee
ISBP	The International Standard Banking Practice
ISDA	The International Swaps and Derivatives Association
ISDGP	The International Standard Demand Guarantees Practice
ISP	The International Standby Practices
IT	Information Technology
LCIA	The London Court of International Arbitration
LMAA	The London Maritime Arbitrators Association
LMLN	The Lloyd's Maritime Law Newsletter
Model Law	UNCITRAL Model Law on International Commercial Arbitration
NAF	The National Arbitration Forum
NGO	Non-Governmental Organisation
NYPE	New York Port of Embarkation
OPEC	The Organization of the Petroleum Exporting Countries
P.R.I.M.E.	The Panel of Recognized International Market Experts in Finance
PCA	The Permanent Court of Arbitration
PECL	The Principles of European Contract Law
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	The Singapore International Arbitration Centre
SMA	The Society of Maritime Arbitrators
SWIFT	The Society for Worldwide Interbank Financial Telecommunication
UCC	The Uniform Commercial Code (USA)
UCP	The Uniform Customs and Practice for Documentary Credits
UDRP	The Uniform Domain Name Dispute Resolution Policy
UEFA	The Union of European Football Associations
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNESCO	The United Nations Educational, Scientific and Cultural Organization
UNIDROIT	The International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
URBPO	The Uniform Rules for Bank Payment Obligations
URC	The ICC Uniform Rules for Collections
URCB	The ICC Uniform Rules for Contract Bonds
URCG	The Uniform Rules for Contract Guarantees

URDG	The ICC Uniform Rules for Demand Guarantees
URR	The ICC Uniform Rules for Bank-to-Bank Reimbursements
USD	The United States dollar
USSR	The Union of Soviet Socialist Republics
WADA	The World Anti-Doping Agency
WADA Code	The World Anti-Doping Code
WIPO	The World Intellectual Property Organization

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CHAPTER 1. INTRODUCTION

This introductory chapter sets the scene and justify the focus of my research about the existence of a separate branch of *lex mercatoria* in the area of trade finance. In order to do so, I will start with a brief discussion about the historical development of *lex mercatoria* from medieval times to the present age. Since I make the research inquiry of a separate branch of *lex mercatoria* in the area of trade finance, the impact of law merchant on this field is specifically addressed. Following this, I will turn to discussing the concept of modern law merchant. In particular, using a vast array of scholarly literature on the subject, I will consider certain scholarly perceptions of definition, sources and criticism of the *lex mercatoria* concept. Thereafter I will discuss the importance of this theory to international dispute resolution and hence provide justification as to why this thesis predominantly looks at *lex mercatoria* from the perspective of dispute resolution. Finally, this chapter ends with the outline of the key research question and related assumptions that limit the boundaries of this study, methodology of the research as well as the structure of this thesis.

1.1. Historical development of *lex mercatoria* and its impact on trade finance

1.1.1. Medieval *lex mercatoria*

It is commonly accepted that the origins of *lex mercatoria* take root from the Middle Ages, approximately in the 11th and 12th centuries, when the substantial growth of commerce emerged across Europe, first starting in the Italian cities and later gradually spreading to France, Spain, England and Germany.[1] Such a rise in commercial trade resulted in the need for a certain regulation of merchants' activities, which would be applicable irrespective of geographical location. Therefore, a body of customary norms has been elaborated by the merchants' community to regulate their relations beside and outside the authority of secular princes[2] with the primary purpose to "[...] compensate for the inability of local commercial laws

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[1] Gesa Baron, 'Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?' (1999) 15 (2) Arbitration International 115, 116; Louise Hayes, 'A Modern *Lex Mercatoria*: Political Rhetoric or Substantive Progress?' (1977) 3 Brooklyn Journal of International Law 210, 212; Oliver Volckart and Antje Mangels, 'Are the Roots of the Modern *Lex Mercatoria* Really Medieval?' (1999) 65 (3) Southern Economic Journal 427, 435. At the same time, some authors argue for the existence of *lex mercatoria* at a much earlier period of history tracing some of its features well back to the times of Greek-Roman antiquity (see Armin von Bogdandy and Sergio Dellavalle, 'The *Lex Mercatoria* of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective' (2013) 4 Transnational Legal Theory 59, 62) or even to the book of Genesis and beyond (see Marlene Wethmar-Lemmer, 'The Development of The Modern *Lex Mercatoria*: A Historical Perspective' (2005) 11 (2) Fundamina 183, 183-186). Notably, some scholars also urge that a 'Eurocentric' perspective should not be used and not to limit the appearance of the *lex mercatoria* phenomenon only to Europe, see Gbenga Oduntan, 'The Reimaginarium of *Lex mercatoria*: Critique of the Geocentric Theory about the Origins and Epistem' (2016) 13 (1) Manchester Journal of International Economic Law 63, 67-68. Also, whilst the majority of academics agree on the roots and existence of *lex mercatoria* in medieval times, it is worth noting that some authors are opposed to such view and regard *lex mercatoria* as a romanticised myth, most notably see Emily Kadens, 'The Myth of the Customary Law Merchant' (2012) 90 Texas Law Review 1152, see also Albrecht Cordes, 'The Future of the History of Medieval Trade Law' (2016) 56 American Journal of Legal History 12; Also, Michaels provides that *lex mercatoria* was not independent of state regulation, but represented an amalgam of state and non-state rules and procedures, kept together by merchants, see Ralf Michaels, 'The True *Lex Mercatoria*: Law Beyond the State' (2007) 14 (2) Indiana Journal of Global Legal Studies 447, 453-454.

[2] Horia Ciurtin, 'A Quest for Deterritorialisation: The "New" *Lex Mercatoria* in International Arbitration' (2019) 85(2) Arbitration 123, 123-124; Adaora Okwor, 'Chapter 20. *Lex Mercatoria* as Transnational Commercial Law: Is the *Lex Mercatoria* Preferentially for the 'Mercatocracy'?' in Mads Andenas and Camilla Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011).

to address problems arising from conducting activities in multiple local settings".[3]

This body of customs and usages, called *lex mercatoria,* had a specific set of attributes,[4] which were highly convenient for the merchants and encouraged their commercial activities:

- it was transnational in nature;[5]
- it was based on common origin and reflected the mercantile customs;[6]
- the concept supported the principle of freedom of contract.[7]
- it was very distinct from local law and was administered not by the judiciary, but by the merchants themselves;[8] and
- the proceedings carried out under *lex mercatoria* were simplified, speedy and informal;[9]

Notably, medieval *lex mercatoria* played an important role in conflict settlement. In particular, the law merchant was the basis for dispute resolution in special merchants' courts.[10] Specifically, the purpose of dispute resolution under *lex mercatoria* in the Middle Ages was to revitalise the contractual agreement between parties through a set of trade usages and customs, which was considered being an equitable basis for decision-making, rather than to determine the winner and the loser in the conflict, and its effectiveness was based on the reputational risks to the parties.[11] In fact, the functioning of these merchants' courts inspired modern scholars to draw comparisons with contemporary arbitral tribunals, hence the argument that nowadays *lex mercatoria* is typically found in arbitration practice.[12]

However, following the rise of the sovereignty of states and consequent extensive codification of legal regulation in the 18th and 19th centuries *lex mercatoria* was gradually replaced by various national legislations with their compulsory material and procedural applicability.[13] Thus, from that period onward law-making started to be inseparably tied to the notion of sovereignty both in civil and common law countries.[14] For example, in England the development of common

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[3] Michael Likosky, 'Compound Corporations: The Public Law Foundations of *Lex Mercatoria*' (2003) 3 Non-State Actors and International Law 251, 276-277.
[4] Baron (n 1).
[5] Ibid; Hayes (n 1). As pointed out by Donahue, while there is no evidence that anyone in the Middle Ages argued that *lex mercatoria* constituted a transnational body of law, "the fact that alien merchants would agree to abide by it suggests that there was at least some legal *lingua franca* by which overseas trade was conducted", see Charles Donahue, 'Medieval and Early Modern *Lex Mercatoria*: An Attempt at The Probatio Diabolica' (2005) 5 Chicago Journal of International Law 21, 26.
[6] Vanessa Wilkinson, 'The New *Lex Mercatoria* – Reality or Academic Fantasy?' (1995) 12 (2) Journal of International Arbitration 103, 105.
[7] Baron (n 1).
[8] Jurisdiction of the merchant courts was limited to the time of the fair or market, see ibid; Hayes (n 1) 214.
[9] Cordes (n 1) 17.
[10] Okwor (n 2).
[11] Alec Stone Sweet, 'The New *Lex Mercatoria* and Transnational Governance' (2006) 13 (5) Journal of European Public Policy 627, 629-630; Leila Anglade, 'The use of transnational rules of law in international arbitration' (2003) 38 Irish Jurist 92, 99.
[12] Okwor (n 2).
[13] Okwor (n 2); Ciurtin (n 2) 125.
[14] Gabriella Sauptelli, 'The European Union, The Member States, and the *Lex Mercatoria*' (2018) 8 (2) Notre Dame Journal of International & Comparative Law 1, 7-8.

law gradually absorbed the autonomous *lex mercatoria* by treating it as a set of commercial customs and practices that had to be proved in each individual case.[15] Moreover, the merchants also lost their right to hear any disputes between them in the special merchant courts following the reform instigated by Lord Chief Justice Sir Edward Coke in the 17th century.[16] Despite some attempts by the merchants to resist such absorption,[17] it is claimed that *lex mercatoria* was made an integral part of common law by Lord Mansfield following a series of his judgments[18] in the 18th century.[19] Some scholars have emphasised that the merchants were disconcerted by litigation and sensed the hostility of the courts, and therefore were in favour of settling disputes between themselves instead of resorting to litigation.[20]

1.1.2. New *lex mercatoria*

The appearance of the doctrine of the new *lex mercatoria* is largely attributed to the Suez Canal crisis in the mid-1950s and relevant legal analysis of the situation by Berthold Goldman, who argued that the Suez Canal Company was not of Egyptian, English or French nationality, but was a juridical person of private law not tied to any national jurisdiction.[21] In his further studies[22] Goldman presented the doctrine as a revival of medieval *lex mercatoria* and was supported in his promotion of such a concept by Clive Schmitthoff, which led to the acknowledgement of both of them as the fathers of the new *lex mercatoria*.[23] The concept of the new *lex mercatoria* has rapidly obtained some considerable support in academic circles as it complemented and fitted nicely with commercial developments in the middle of the 20th century, such as increased globalisation and the establishment of an international community following World War II, rapid technological progress, substantial international trade growth and the inception of an international arbitration framework.[24]

However, there are some noteworthy differences between the views of Goldman and

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[15] Baron (n 1) 118. In addition, there is an argument that most national legal systems absorbed and incorporated *lex mercatoria*, see Wethmar-Lemmer (n 1) 190-191; Orsolya Toth, *The Lex Mercatoria in Theory and Practice* (OUP 2017) 26-27; Michael Medwig, 'The New *Law Merchant*: Legal Rhetoric and Commercial Reality' (1993) 24 (2) Law and Policy in International Business 589, 592; Jorge Jaramillo-Vargas, '*Lex Mercatoria* - A Flexible Tool to Meet Transnational Trade Law Needs Today' (2002) 2 Revist@ e-mercatoria 1, 3; Likosky (n 3) 278.

[16] Hayes (n 1) 214; Peter Mazzacano, 'The *Lex Mercatoria* as Autonomous Law' (2008) Comparative Research in Law & Political Economy, Osgoode Hall Law School Legal Studies Research Paper Series Research Paper No. 29/2008, 10.

[17] See Gerard Malyne's *Consuetudo, vel, Lex mercatoria*, which was first published in 1622 and promoted the notion that mercantile cases should be treated independently of common law, as cited in Donahue (n 5) 23.

[18] Most notably see *Pillans and Rose v. Van Mierop and Hopkins* 3 Burr. 1663, 97 E.R. 1035 (1765), wherein he stated that the rules of the law merchant are not matters of customs to be proved by the parties, but questions of law to be decided by the courts. See also Mazzacano (n 16) 11.

[19] Henry Barker, 'The Rise of The *Lex Mercatoria* and Its Absorption by the Common Law of England' (1916) 5 Kentucky Law Journal 20, 29 and Harold Berman and Colin Kaufman, 'The Law of International Commercial Transactions (*Lex Mercatoria*)' (1978) 19 Harvard International Law Journal 221, 226. See also Arthur Schreiber, 'Lord Mansfield – The Father of Insurance Law' (1960) Insurance Law Journal (December issue) 766, 768.

[20] Hayes (n 1) 215; Rufus James Trimble, 'The Law Merchant and The Letter of Credit' (1948) 61 (6) Harvard Law Review 981, 987-990.

[21] Berthold Goldman, 'La Compagnie de Suez, societe internationale' *Le Monde* (Paris, 4 October 1956) as cited in Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd edn, Kluwer Law International 2010) 1.

[22] See Berthold Goldman, 'Frontieres du Droit et "*Lex Mercatoria*"' (1964) 9 Archives De Philosophie du Droit 177.

[23] Gilles Cuniberti, 'Three Theories of *Lex Mercatoria*' (2014) 52 Columbia Journal of Transnational Law 369, 379; Ian Turley, '*Lex Mercatoria*: *Quo Vadis*?' (1999) Journal of South African Law 454, 455-463.

[24] Wilkinson (n 6).

Schmitthoff with regard to the nature and substance of *lex mercatoria*. For example, while Goldman argued that the new *lex mercatoria* is totally autonomous of any national law, in the view of Schmitthoff the autonomy of the concept is entirely conditional and exists upon the authorisation of sovereign states.[25] Schmitthoff also saw a peaceful co-existence of merchant customs and national regulation which would result in better growth and adaptability of international business in the long-term perspective.[26] This led to a division of views concerning *lex mercatoria* among the proponents of the law merchant: the followers of Goldman's view are often referred as 'purist' or 'autonomists', and the supporters of Schmitthoff's ideas are commonly called 'integrationists'.[27] Nevertheless, their perception of the new *lex mercatoria* has a lot in common, such as basic factual grounding and commitment to the autonomous regulation of transnational business.[28]

This new *lex mercatoria* is not exactly the mere representation of its medieval predecessor, primarily because of the changed circumstances such as the range and variety of available commercial activities, the pace and quality of technological progress, a previously unseen level of globalisation of business and, perhaps most importantly, the role and power of the state.[29] Therefore, it is a much more complex concept. In fact, some writers even claim that there are so many differences between the challenges that are addressed by medieval law merchant and modern *lex mercatoria* that, in essence, they are two distinct regimes.[30] Pursuant to such views, it was merely for legitimacy purposes that an old romanticised label was attached to a new type of regime which emerged in the second half of the 20th century, *i.e.* if modern *lex mercatoria* "was to have any future, it had to recommend itself as stemming from a respectable past".[31]

For example, one of the defining features of this new regime is its ability to serve as fertile ground for the harmonisation of international trade law.[32] In fact, Schmitthoff directly equated the law merchant with the process of legal harmonisation and unification of the law of

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[25] Clive Schmitthoff, *The Sources of the Law of International Trade: With Special Reference to East-West Trade* (Praeger 1964) 35; Gbenga Bamodu, 'Exploring the Interrelationships of Transnational Commercial Law, "The New *Lex Mercatoria*" and International Commercial Arbitration' (1998) 10 African Journal of International and Comparative Law 31, 33.

[26] Nikitas Hatzimihail, 'The Many Lives and Faces of *Lex Mercatoria*: History as Genealogy in International Business Law' (2008) 71 Law and Contemporary Problems 169, 189.

[27] Sometimes also distinguished as narrow and wide views respectively, see ibid 171; for a more detailed discussion on the approaches of the founding fathers to *lex mercatoria* see Toth (n 15) 31-46.

[28] Toth (n 15) 190.

[29] Ciurtin (n 2) 123-125; Sauptelli (n 14) 3-5.

[30] Bamodu (n 25) 31-45.

[31] Ciurtin (n 2) 123-126; Mert Elcin, '*Lex Mercatoria* in International Arbitration Theory and Practice' (PhD Thesis, European University Institute 2012) 11-22; see also similar discussion in Ralf Michaels, 'Response Legal Medievalism in *Lex mercatoria* Scholarship' (2012) 90 Texas Law Review 259, 261-265.

[32] Okwor (n 2). At the same time, however, some argue that *lex mercatoria* is not suitable for harmonisation. For example, Mustill notes that because of the a-national nature of *lex mercatoria*, it has nothing to do with the harmonisation of international trade law due to the fact that harmonisation is concerned with minimisation of the differences between the laws of individual nations, see Lord Justice Mustill, 'The New *Lex Mercatoria*: The First Twenty-Five Years' (1988) 4 Arbitration International 86, 88. Douglas agrees with this view and states that although harmonisation and the law merchant may share similar goals, their focus is on different objectives, so one should not treat them as being synonymous with each other, see Michael Douglas, 'The *Lex Mercatoria* and the Culture of Transnational Industry' (2006) 13 University of Miami International and Comparative Law Review 367, 373.

international trade,[33] and his view has influenced many scholars who adhere to the 'integrationist' approach towards *lex mercatoria*.[34] It is stated that in the past, customs played an important role in the harmonisation of laws worldwide and *lex mercatoria*, which is at its core a customary set of rules, represents an excellent starting point for the harmonisation of laws.[35] In fact, Cremades and Plehn distinguish two basic approaches towards harmonisation: a) the national approach, under which nations, as the only actors capable of creation of law, adopt similar commercial laws; and b) the non-national approach, under which a single commercial law is developed, which is largely autonomous from national laws, *i.e.* the new *lex mercatoria*.[36] They conclude that there is no better approach between these two, as each has its own benefits and drawbacks, but both national and non-national approaches should be seen as complementary rather than mutually exclusive.[37] It is worth emphasising here that this notion of a complementary and symbiotic relationship of modern *lex mercatoria* and national law is not limited to the aspect of harmonisation of international law, and indeed is the underlying idea of this study overall.

1.1.3. *Lex mercatoria* and trade finance

Lex mercatoria has had a significant influence on the development of trade finance. This is because historically the merchants rather than the law have been in charge of developing innovative methods of payment in an attempt to accommodate various economic interests of the traders.[38] Thus, it is claimed that *lex mercatoria* was the reason for the appearance of many documentary instruments and trade documents, such as the letters of credit, the bill of exchange and the promissory note.[39] In essence, the law followed the practices of merchants[40] and the first legal regulations were developed only in the middle of the 19th century.[41]

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[33] Clive Schmitthoff, 'The Unification of the Law of International Trade' (1968) Journal of Business Law 105.

[34] Toth (n 15) 32, 47.

[35] Mary Ayad, 'The Vienna Convention as Authority for the Use of Precedent as Customary Practice in International Arbitrations of Oil Concessions and Investment Disputes in North Africa and the Gulf Arab States; or a *Lex Mercatoria* for a *Lex Petrolea*' (2013) 14 The Journal of World Investment & Trade 918, 921-929.

[36] Bernardo Cremades and Steven Plehn, 'The New *Lex Mercatoria* and The Harmonization of The Laws of International Commercial Transactions' (1984) 2 Boston University International Law Journal 317, 321-322.

[37] ibid 327.

[38] Alan Davidson, 'The Evolution of Letters of Credit Transactions' (1995), 3 Journal of International Banking and Financial Law 128, 140; see also Boris Kozolchyk, 'The Legal Nature of the Irrevocable Commercial Letter of Credit' (1965) 14 The American Journal of Comparative Law 395, 395-400; see also Philip Thayer, 'Irrevocable Credits in International Commerce: Their Legal Nature' (1936) 36 (7) Columbia Law Review 1031, 1031-1033

[39] Trimble (n 20) 981; Brooke Wunnicke, 'A Lawyer's Personal Welcome to the New UCP' (2007) 13 (2) DCInsight; Davidson (n 38) 128; see also William Holdsworth, 'Origins and Early History of Negotiable Instruments' (1915) 31 The Law Quarterly Review 12; Wakefield Simapungula, 'The Law Relating to Bankers' Commercial Documentary Letters of Credit Under English Law: A Study in International Business Financing' (PhD Thesis, University of Wales 1992) 16-20; Nicholas Manganaro, 'About-Face: the New Rules of Strict Compliance Under the Uniform Customs and Practice for Documentary Credits (UCP 600)' (2011) 14 International Trade and Business Law Review 273, 275; see also multiple references in Jan Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law: Volume 3 - Financial Products, Financial Services and Financial Regulation* (6th edn, Hart Publishing 2016) 57-58. Here Dalhuisen also emphasises the importance of the new *lex mercatoria* for the development of modern financial and negotiable products.

[40] Davidson (n 38) 140; Michelle Kelly-Louw, 'The Law Applicable to Demand Guarantees and Standby Letters of Credit' (2010) 24(2) Speculum Juris 1.

[41] Simapungula (n 39) 18; Wilbert Ward and Henry Harfield, *Bank Credits and Acceptances* (4th edn, The Ronald Press Company 1958) 146-150.

Furthermore, it is also argued that following the absorption of the law merchant by common law the key principles governing the use of the documentary instruments (negotiability in the case of a bill of exchange and autonomy in the case of a letter of credit) remained untouched, even though they were clearly against the original common law doctrine of consideration and a rule that a chose in action was not assignable.[42] In civil law countries the process was somewhat similar and *lex mercatoria* has not entirely been eradicated by legal regulation nationalisation and continued to operate in relation to trade finance instruments, such as letters of credit and bills of lading.[43] Thus, documentary instruments to which *lex mercatoria* gave birth were still regulated by its rules. Trimble provides that *Pillans and Rose v. Van Mierop and Hopkins*[44] is an illustrative example of this. In this case it was held that a letter of credit was enforceable in a commercial transaction without compliance with the common law rules governing consideration, thus confirming the position that the elements of a letter of credit and its legal effects are regulated by the law merchant.[45] Kozolchyk adds that Lord Mansfield, who was deciding the case, intuitively disposed of the legalistic obstacle in order to protect the enforceability of a type of mercantile promise that was thereafter to become commonplace in local and international trade.[46] Unfortunately, the novel proposition of Lord Mansfield was subsequently rejected in *Rann v. Hughes*[47] in "a blow from which it has not yet recovered".[48] Following this judgment, English courts clearly stuck to the position that letters of credit should be viewed through the prism of law rather than from the merchants' perspective.[49]

Notably, the position expressed by Lord Mansfield was affirmed and lasted longer in the USA, which inherited the common law of England along with any applicable and used law merchant.[50] In *Russell v. Timothy Wiggin & Co*[51] Justice Story, analysing the position in *Pillans and Rose v. Van Mierop and Hopkins,* held that letters of credit, as well as other negotiable instruments, are governed by commercial mercantile law, not common law.[52] Furthermore, Justice Stone in *Lamborn v. National Bank of Commerce*[53] implicitly adhered to the position that letters of credit should be governed by the law merchant by stating that they are a distinctive mercantile contract of a special nature.[54] US-based academics at that time have also consistently emphasised the unique nature of a documentary letter of credit, which, whilst being a single instrument, combines features of a contractual offer, agency, third-party

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[42] Trimble (n 20) 986-987.
[43] Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (n 39) 18, 63.
[44] 3 Burr. 1663, 1669, 97 Eng. Rep. 1035, 1038 (K. B. 1765)
[45] Trimble (n 20) 991-992; see Simapungula (n 39) 21.
[46] Kozolchyk (n 38) 402.
[47] (1779) 1 Doug. 297
[48] Arthur Davis, *The Law Relating to Commercial Letters of Credit* (2nd edn, Isaac Pitman & Sons Ltd 1954) 7 as cited in Kozolchyk (n 38) 402.
[49] See discussion in Gerard McMeel, 'Pillans v Van Mierop (1765)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008).
[50] Trimble (n 20) 992.
[51] 21 Fed. Cas. 68, No. 12,16s (C. C. D. Mass. 1842).
[52] See Trimble (n 20) 992.
[53] 276 U. S. 469, 474 (1928).
[54] Trimble (n 20) 994.

promise, delegation of debt and suretyship arrangement, which under the influence of merchant practices became a *sui generis* product.[55] In fact, a number of contemporary US-based researchers hold to the position that letters of credit are a *sui generis* manifestation of *lex mercatoria*.[56]

Nonetheless, gradually the practice of application of common law principles by judges educated in common law became widespread and resulted in a considerable degree of confusion.[57] The academic community also have been incapable of proposing a clear model for governance of a letter of credit transaction based on legal principles and doctrines, suggesting a diversity of often contradictory opinions.[58] In fact, it is acknowledged that nowadays many, if not most, of the instincts of a modern commercial lawyer or jurist are inapt for the correct understanding of the functioning and application of letters of credit (as well as other documentary instruments).[59] Furthermore, the clear inability of the law to follow promptly the developments in trade finance and correctly regulate certain aspects of documentary instruments resulted in that some researchers drawing a distinction between the law and practice of letters of credit.[60] In particular, it has long been noted that due to the growth of banking activities and the banks' role in the economy, such as through financing of international trade, banks exercise significant legal interpretative power as well as developing their own practices, which do not get sufficient representation in a state's legal systems.[61]

The functioning of letters of credit is an illustrative example of commercial self-regulation which is undertaken by banks and traders.[62] In fact, legal practitioners have been puzzled regarding why such self-regulation has been successful and workable, mainly because the existing system cannot properly be classified from a legal viewpoint.[63] For example, Byrne and Mann in their studies advocated that it is not the convenience of the instrument, but rather non-legal reasons that apply, such as trust, filling in informational gaps and verification of credibility of

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[55] Kozolchyk (n 38) 412-413, 421; see also Roy Goode, 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (1995) 39 Saint Louis University Law Journal 725, 731-732.

[56] James Byrne, 'Going Beyond the Four Corners: Reflections on Teaching Letters of Credit as a Subset of International Banking Law' (2014) 3 American University Business Law Review 1, 14; Ronald Mann, 'The Role of Letters of Credit in Payment Transactions' (2000) 99 Michigan Law Review 2494, 2494-2496, 2515-2533.

[57] Trimble (n 20) 994; see also John Dolan, 'The Drafting History of UCC Article 5' (2016) Wayne State University Law School Legal Studies Research Paper Series No. 2016-04, vii-viii.

[58] For a comprehensive overview of such proposals see Kozolchyk (n 38) 400-412 and Thayer (n 38). See also Trimble (n 20) 996-1000; Byrne (n 56) 14.

[59] Byrne (n 56) 9.

[60] See Peter Ellinger, 'Banking Law and Banking Practice in Their Conceptual and Historical Perspectives' (2013) Singapore Journal of Legal Studies 24; Byrne (n 56).

[61] Trimble (n 20) 1004

[62] Byrne (n 56) 12.

[63] ibid; Kozolchyk (n 38) 400-421.

the transaction participants.[64] Thus, if non-legal reasons prevail in the rationale for the use of letters of credit, it is hardly surprising that any attempts to impose any purely legal concepts over long-established relations between parties to a letter of credit transaction or to frame such relations within the confines of legal doctrines have largely failed: such approaches, according to Byrne, result in a misunderstanding of letters of credit practice.[65] He further claims that this is the fundamental problem with judicial practice, which views letters of credit exclusively from a legal standpoint and exploit legal techniques accordingly, thus "more than half of reported decisions are wrong; and, of those that are correct, more than half are correct for the wrong reason".[66]

Therefore, given the rich historical tradition and current problematic issues in the identification of a proper governing regime of documentary instruments, this study directly links the theory of *lex mercatoria* and its application to the area of trade finance. In particular, it will be argued herein that there is a distinct branch of modern law merchant in the area of trade finance, namely *lex documentaria commercium*. This branch is not only sophisticatedly structured but also has considerable potential to solve the long-existing problem of determination of law applicable to documentary instruments (which will be shown in the example of letters of credit in Chapter 3 of this thesis).

1.2. The concept of *lex mercatoria* and its criticism

Having discussed the historical development of *lex mercatoria* and its revitalisation in the second half of the 20th century, this section addresses some basics about the concept in order to introduce the reader to it and, having done that, to proceed with the discussion over the existence of a separate branch of the law merchant in the area of trade finance. As was noted above, currently there are a number of views of the concept that stem from the original differences in the opinions of the "founding fathers" over certain aspects of *lex mercatoria*.

The central pillar of the concept of *lex mercatoria* is the notion that the state may not be the one and only social structure which creates and authorises law, thus suggesting a movement from the territorial to a better functional approach to law.[67] According to the theoretical basis

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[64] See Byrne (n 56) 12; Mann (n 56) 2521-2533; see also Jacob Corre, 'Reconciling the Old Theory and the New Evidence: Comments on Ronald Mann's "The Role of Letters of Credit in Payment Transactions"' (2000) 98 Michigan Law Review 2548; Clayton Gillette, 'Letters of Credit as Signals: Comments on Ronald Mann's "The Role of Letters of Credit in Payment Transactions"' (2000) 98 Michigan Law Review 2537. In fact, McLaughlin goes even further by arguing that the use of letters of credit may facilitate dispute resolution between states involved in certain types of international conflicts. As an example, the author describes how the issuance of a letter of credit helped to settle a dispute between the USA and Cuba in 1961 (the Bay of Pigs conflict), see Gerald McLaughlin, 'Remembering the Bay of Pigs: Using Letters of Credit to Facilitate the Resolution of International Disputes' (2004) 32 Georgia Journal of International and Comparative Law 743, 767-777.

[65] Byrne (n 56) 13. See also Kozolchyk (n 38) 400-412.

[66] Byrne (n 56) 13.

[67] Aleksandar Goldstaijn, 'The New Law Merchant Reconsidered' in Clive Schmitthoff and Fritz Fabricius (eds), *Law and International Trade: Recht und Internationaler Handel* (Athenäum Verlag 1973); Jan Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order: The *Lex Mercatoria* and its Application – Moving from the Theories of Legal Positivism and Formalism to the Practicalities of Legal Pluralism and Dynamism' (2008) 19 (5) European Business Law Review 985.

of *lex mercatoria*, it is of a dynamic nature,[68] customary and spontaneous, and is frequently expressed in practices that might be changed overnight if business logic or market forces so require, as opposed to the existing legal positivist (*i.e.* formalistic and nationalistic approach to what actually constitutes law) perception of law, which views law as being of a rather static, nationalistic and domestic nature along with the rejection of dynamism as a self-creating legal force.[69] The underlying rationale of *lex mercatoria* theory and its core benefit for the actors in international trade is that it can allow the parties to escape conflict of law issues.[70]

1.2.1. Definition of *lex mercatoria*

Due to the fact that there are so many authors who argue in favour of the concept of *lex mercatoria* either from 'purist' or 'integrationist' positions, their views are often incongruous in many aspects.[71] Therefore, currently there is no uniform approach to the definition and the exact nature of *lex mercatoria*.[72]

For example, Goldman defines *lex mercatoria* as a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.[73] Goode proceeds with the notion that *lex mercatoria* is a part of transnational commercial law which is uncodified, non-statutory and non-conventional, and consists of customary commercial law, customary rules of evidence and procedure and general principles of commercial law, including international public policy.[74] Berman and Kaufman refer to *lex mercatoria* as an "international body of law, founded on the commercial understandings and contract practices of an international community composed principally of mercantile, shipping, insurance, and banking enterprises of all countries".[75] Lew defines *lex mercatoria* as a non-national or transnational commercial law as applied by arbitrators that governs certain aspects of international trade not otherwise regulated by

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[68] Leon Trakman, 'From the Medieval Law Merchant To E-Merchant Law' (2003) 53 University of Toronto Law Journal 265, 282-283.

[69] Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 986-987; Fabrizio La Spada, 'The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono' in Gabrielle Kaufmann-Kohler and Blaise Stucki (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer Law International 2004); Berthold Goldman, 'The Applicable Law: General Principles of Law – The *Lex Mercatoria*' in Julian Lew (ed), *Contemporary Problems in International Arbitration* (Springer-Science+Business Media 1987)

[70] Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 International & Comparative Law Quarterly 1, 36; Roy Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) 54 (3) International & Comparative Law Quarterly 539, 542.

[71] Baron (n 1).

[72] Markus Petsche, 'The Application of Transnational Law (*Lex Mercatoria*) by Domestic Courts' (2014) 10 (3) Journal of Private International Law 489, 490; Wilkinson (n 6) 104; Hatzimihail (n 26) 170-171; Toth (n 15) 8; Ercüment Erdem and Ceyda Süral, 'In Support of *Lex Mercatoria*' (2009) International Financial Law Review 9; Ana López Rodríguez, '*Lex Mercatoria*', 2 Retsvidenskabeligt Tidsskrift: Rettid 46, 47; Richard Howarth, '*Lex Mercatoria*: Can General Principles of Law Govern International Commercial Contracts?' (2004) 10 Canterbury Law Review 36, 43; Turley (n 23); Jaramillo-Vargas (n 15) 3-4; Adaora Okwor, for example, mentions that the only consensus with regard to the meaning of *lex mercatoria* is that it translates to 'law merchant', see Okwor (n 2).

[73] Goldman (n 69).

[74] Goode, 'Usage and Its Reception in Transnational Commercial Law' (n 70) 3-4.

[75] Berman and Kaufman (n 19) 272-274.

national law.[76] Some scholars have further suggested that *lex mercatoria* should be viewed from its functional purpose rather a rigid definition point. Therefore, currently *lex mercatoria* can be considered as (a) a legal system;[77] (b) a set of legal rules;[78] and (c) a method.[79]

Paulsson summarised various understandings behind the concept of modern law merchant and established that today international legal scholarship provides for the three major views with regard to it:[80]

1) to signify a 'mass' of rules and principles without any internal consistency or systematic quality, which complements the otherwise applicable domestic law;

2) to define a totality of trade usages that are refined to suit the needs of international commerce, which is often referred to as an 'autonomous law of world trade';

3) to specify an independent and supranational legal system which derives its justification and validity from its autonomous existence.

Upon evaluation of different definitions of *lex mercatoria* it is clear that the main division in the approaches arises from the role of state law and its interrelationship with the law merchant.[81] Nevertheless, despite various definitions and approaches towards the law merchant, the purpose of *lex mercatoria* is relatively clear: to make regulation of international commerce more efficient by taking into account the needs and practices of traders and avoiding the idiosyncrasies and obstacles created by national laws.[82] Such efficiency, as will be demonstrated in this work, does not need to be achieved through the subordinated relation between *lex mercatoria* and national law, but can be accomplished via their mutual co-existence.

1.2.2. Sources of *lex mercatoria*

Modern *lex mercatoria* does not simply consist of customs and usages and is more advanced and sophisticated compared to its medieval predecessor. This is predominantly because of the changed role of the state, advanced economy and the appearance of a variety of commercial activities, including cross-border, unknown in the Middle Ages, hence more extensive

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[76] Julian Lew, 'The Case for the Publication of Arbitration Awards' in Jan Schultsz and Albert Jan Van Den Berg (eds), *The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders* (Kluwer Law and Taxation Publishers 1982).
[77] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997); Cremades and Plehn (n 36).
[78] Jean Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) 697, 704; Andreas Lowenfeld, '*Lex Mercatoria*: An Arbitrator's View' (1990) 6 (2) Arbitration International 133.
[79] Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?' (2001) 17 (1) Arbitration International 59; Felix Dasser, '*Lex Mercatoria* – Critical Comments on a Tricky Topic' in Richard Appelbaum, William Felstiner and Volkmar Gessner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing 2002).
[80] Jan Paulsson, 'La *Lex Mercatoria* dans L'arbitrage CCI' (1990) Revue de l'Arbitrage 55 as cited in Petsche (n 72). For a brief summary of various other definitions of *lex mercatoria* see Wilkinson (n 6) 104-105; Michael Frischkorn, 'Definitions of the *Lex Mercatoria* and the Effects of Codifications on the *Lex Mercatoria*'s Flexibility' (2005) 7 European Journal of Law Reform 331, 333-334; Berger (n 21) 61-62; Christopher Drahozal, 'Contracting Out of National Law: An Empirical Look at the New Law Merchant' (2005) 80 (2) Notre Dame Law Review 523, 529; Rodríguez (n 72) 48; Douglas (n 32) 370-371.
[81] Hatzimihail (n 26) 171.
[82] Jaramillo-Vargas (n 15) 4.

elaboration of the law governing international business transactions.[83]

The issue of sources of modern *lex mercatoria* is highly debatable and, as with the absence of a uniform approach to a definition of *lex mercatoria*, there is no universally accepted list of sources of the law merchant.[84] In fact, the availability of a wealth of sources is not likely to transform *lex mercatoria* into an easily accessible code of transnational commercial law[85] and is something for which the whole concept is sharply criticised due to its vague borders and place in contemporary economic regulation.[86] As with the definition of *lex mercatoria*, the most controversial aspect of classification of sources of modern law merchant is the position of domestic law.

'The fathers' of the new *lex mercatoria* also had different views towards its sources. Thus, Schmitthoff supported the notion of restricted sources of *lex mercatoria* and limited them only to international conventions, model laws, trade usages and practices.[87] On the other hand, Goldman argued that in addition to the abovementioned sources, *lex mercatoria* also consists of general principles of international contract law, uniform rules, standard contract forms and clauses, codes of conduct and arbitral awards.[88] Goldman's approach is considered as being a liberal one and, along with certain variations, currently constitutes the dominant opinion in the modern doctrine.[89]

A number of authors have provided their classification and hierarchy of sources of *lex mercatoria*.[90] For example, Dalhuisen provides the following arrangement of sources and their hierarchy:[91]

1) transnational fundamental legal principles;
2) mandatory custom;
3) mandatory uniform treaty law;

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[83] Ahmet Cemil Yildirim, 'Solid, Liquid and Gas Forms of the New *Lex Mercatoria*: How Do They Operate in Practice?' in Ahmet Cemil Yıldırım and Serhat Eskiyörük (eds), *International Commercial Arbitration and the New Lex Mercatoria / Uluslararasi Ticari Tahkim ve Yeni Lex Mercatoria* (On İki Levha Yayıncılık 2014) 19.

[84] Wilkinson (n 6) 106-107; Keith Highet, 'The Enigma of The *Lex Mercatoria*' (1989) 63 Tulane Law Review 613, 623. Moreover, there is even no universal agreement regarding the meaning of the terms of the sources of *lex mercatoria*, *e.g.* "trade usages", "customary law", "general principles of law", etc, see Toth (n 15) 8-9.

[85] Cuniberti (n 23) 382.

[86] ibid 390.

[87] Clive Schmitthoff, 'International Business Law: a New Law Merchant' in Ronald St. John Macdonald (ed), *Current Law and Social Problems* (University of Toronto Press 1961); Schmitthoff, 'The Unification of the Law of International Trade' (n 33).

[88] Berthold Goldman, 'La *Lex Mercatoria* Dans Les Contrats et L'arbitrage Internationaux: Réalité et Perspectives' (1979) 106 Journal du Droit International 494 as cited in Tolga Ayoğlu, 'Some Reflections on the Sources of *Lex Mercatoria*' in Ahmet Cemil Yıldırım and Serhat Eskiyörük (eds), *International Commercial Arbitration and the New Lex Mercatoria / Uluslararasi Ticari Tahkim ve Yeni Lex Mercatoria* (On İki Levha Yayıncılık 2014) 27.

[89] Tolga Ayoğlu (n 88) 28, 36; Toth (n 15) 46.

[90] For a brief summary of views on sources of *lex mercatoria* see Wilkinson (n 6) 106-107.

[91] Jan Dalhuisen, 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its *Lex Mercatoria*' (2006) 24 Berkeley Journal of International Law 129, 180; Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 1038-1039.

4) the contract;

5) directory custom;

6) directory uniform treaty law;

7) general principles largely derived from comparative law, uniform treaty law, the uniform rules issued by the International Chamber of Commerce (the ICC), such as, for example, the Uniform Customs and Practice for Documentary Credits (the UCP), the Uniform Rules for Demand Guarantees (the URDG), etc.; and

8) residually, domestic laws found through the conflict of laws' rules.

Yildirim provides a simplified and metaphorical classification of the sources of the new *lex mercatoria* pursuant to their connection with positive law and degree of formulation:[92]

1) 'Solid form' sources, which include the rules of state or inter-state origin, such as international conventions, model laws and domestic codifications that relate to international economic relations and international commercial arbitration;

2) 'Liquid form' sources, which include rules governing international commercial relations formulated by international organisations, chambers of commerce, trade associations, bars (legal chambers) and other NGOs, that are not adopted by states (the author provides UCP as one example of such sources; accordingly, DOCDEX Rules also fall into this category);

3) 'Gas form' sources, which consist of unformulated rules and principles applied by international tribunals.

Each of these sources can be either procedural or substantive.[93] Yildirim also presents a practical example of how these sources interrelate within a single arbitration case.[94] He argues that the use of different sources of the new *lex mercatoria* is so widespread that we do not even recognise them when they are employed.[95] To some extent, this statement is also supported by Lando who puts forward his classification of sources consisting of public international law, uniform laws, general principles of law, rules of international organisations,

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[92] Yildirim (n 83) 19-20.

[93] ibid 23-24.

[94] ibid 25. In his description of such example Yildirim notes that when parties submit their case to ICC arbitration, they accept application of their rules of arbitration (a procedural "liquid" source). The demand guarantee agreement in the dispute was subject to the ICC's URDG (a substantive "liquid" source). The parties agreed to make a Redfern List (a procedural "gas" source). The arbitral tribunal discussed the substantive rules of the respondent's country (a substantive "solid" source) and based its decision on the principle of good faith (a substantive "gas" source). The enforceability of the award was subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (a procedural "solid" source).

[95] ibid 26; see also Elcin (n 31) 186-187.

customs and usages, standard form contracts, and reported arbitration awards.[96] At the same time Lando remarks that that it is not possible to provide a full list of elements of *lex mercatoria*.[97]

Two remarks should be made at this point of discussion. Firstly, in order to escape this debate about what constitutes a source of *lex mercatoria* and what does not (it is not the purpose of this study to elaborate and identify them), a simplified classification as understood by the author would suffice here. Thus, to suggest it plainly, any source that is a product of domestic law is unlikely to be regarded as a source of *lex mercatoria*, whereas any source which is a product of non-state law-making may become such a source upon certain conditions, for example, its accessibility and extensive use in the industry.

Secondly, when discussing the suggested sources of modern *lex mercatoria*, one can undoubtedly identify that the above classifications are quite generalised and may not be representative of current practice in certain industries. Take, for instance, the fields of trade finance and maritime industry, both of which are considered as being the key areas for international trade and *lex mercatoria*. It is notable that in the maritime industry standard form contracts produced by industry-specific associations (most often by the the Baltic and International Maritime Council) are used for nearly all transactions.[98] At the same time, standard form contracts are rarely utilised in trade finance, hence their importance to this industry is entirely different. Similarly, uniform rules for certain types of documentary instruments have been commonly used and referred to almost anywhere in the world, whilst in the maritime industry the few uniform rules issued have received limited support. Furthermore, customs and usages in these respective industries are totally different and those practiced in the maritime industry do not have any relevance to the area of trade finance (or, in fact, any other areas). At the same time, customs and usages in both of these fields can (and should) represent modern *lex mercatoria*.

Therefore, taking into account the diversity of modern commercial activities, a significant number of scholars have been indicating that unlike its medieval predecessor, modern *lex mercatoria* is fragmented and consists of several branches depending on the industry or field where its norms apply. Each of these branches has its own unique customs and usages as well as other sources,[99] while general principles of *lex mercatoria* are being applied too. In

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[96] Ole Lando, 'The Law Applicable to the Merits of the Dispute' in Julian Lew (ed), *Contemporary Problems in International Arbitration* (Springer-Science+Business Media 1987) 749-751. Mustill offers the same classification of sources and adds another source, namely the public policy of the country in which enforcement of the award is likely to be requested, see Mustill (n 32) 109.

[97] Lando (n 96) 749.

[98] Gralf-Peter Calliess and Annika Klopp, '*Lex Maritima*: Vanishing Commercial Trial – Fading Domestic Law?' (2015) ZenTra Working Paper in Transnational Studies No. 56/2015, 8.

[99] Abul Maniruzzaman, 'The *Lex Mercatoria* and International Contracts: A Challenge for International Commercial Arbitration?' (1999) 14 American University International Law Review 657, 668-669; Lorena Carvajal Arenas, 'Good Faith in The *Lex Mercatoria*: An Analysis of Arbitral Practice and Major Western Legal Systems' (PhD Thesis, University of Portsmouth 2011) 19.

particular, there is a considerable array of literature available on *lex petrolea* in the field of the petroleum industry,[100] *lex sportiva* in regard to sport,[101] *lex maritima* in relation to maritime matters, [102] *lex informatica* (also known as *lex electronica*) in the area of electronic transactions and Internet regulation,[103] and several others.[104] Chapter 2 of this thesis is devoted to the analysis of this development of separation of *lex mercatoria* into a number of branches and explores similarities among them. Following identification of such similarities they will be projected on the area of trade finance in order to establish whether there are plausible grounds to argue for the existence of another branch of *lex mercatoria*, namely *lex documentaria commercium*,[105] within the confines of trade finance, which specifically covers the area of documentary instruments in international trade.

1.2.3. Criticism of the concept

As pointed out by Berger, there is no other topic within the realm of international business law which has been so controversial and provoked such vigorous debate as the doctrine of the new *lex mercatoria*.[106] In fact, given the vague nature of the theory and some quite polarising views of its supporters on its certain elements, it is not surprising that the concept of *lex mercatoria* has been subjected to some serious criticism.

The critics of the law merchant are generally advancing the following arguments:[107]

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[100] See Timothy Martin, '*Lex Petrolea* in International Law' in Ronne King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2014); Thomas Childs, 'Update on *Lex Petrolea*: the Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' (2011) 4(3) Journal of World Energy Law and Business 214; Kim Talus, Scott Looper and Steven Otillar, '*Lex Petrolea* and the Internationalization of Petroleum Agreements: Focus on Host Government Contracts' (2012) 5 (3) Journal of World Energy Law and Business 181; Nima Mersadi Tabari, *Lex Petrolea and International Investment Law: Law and Practice in the Persian Gulf* (Routledge 2016); Doak Bishop, 'International Arbitration of Petroleum Disputes: The Development of a *Lex Petrolea*' (1997) University of Dundee, Centre for Energy, Petroleum and Mineral Law and Policy discussion paper No. 12.

[101] See Robert Siekmann and Janwillem Soek (eds), *Lex Sportiva*: *What is Sports Law?* (T.M.C. Asser Press 2012); Ken Foster, '*Lex Sportiva* and *Lex Ludica*: the Court of Arbitration for Sport's Jurisprudence' (2006) 3 (2) Entertainment and Sports Law Journal 1; Robert Siekmann, 'What Is Sports Law? *Lex Sportiva* and *Lex Ludica*: A Reassessment of Content and Terminology' (2011) 3-4 International Sports Law Journal 3; Boris Kolev, '*Lex Sportiva* and *Lex Mercatoria*' (2008) 1-2 International Sports Law Journal 57.

[102] Andreas Maurer, *Lex Maritima, Grundzüge eines Transnationalen Seehandelsrechts [Lex maritima. The Main Features of a Transnational Maritime Law]* (Mohr Siebeck 2012); William Tetley, 'The General Maritime Law – *The Lex Maritima*' (1994) 20 Syracuse Journal of International Law and Commerce 105.

[103] Trakman (n 68); Fabrizio Marrella and Christopher Yoo, 'Is Open Source Software the New *Lex Mercatoria*?' (2007) 47 (4) Virginia Journal of International Law 807; Aron Mefford, '*Lex Informatica*: Foundations of Law on the Internet' (1997) 5 The Indiana Journal of Global Legal Studies 211; Joel Reidenberg, '*Lex Informatica*: The Formulation of Information Policy Rules through Technology' (1998) 76 Texas Law Review 553; Michael Rowe, *Electronic Trade Payments: A Practical Guide to Electronic Banking and International Trade* (IBC 1987); Bernard Reams, *Electronic Contracting Law: Edi And Business Transactions* (Clark Boardman Callaghan 1996).

[104] See some academic accounts on the subject of *lex constructionis* in the area of international construction, see Douglas (n 32) 398-399; Charles Molineaux, 'Moving Toward a Construction *Lex Mercatoria: A Lex Constructionis*' (1997) 14 Journal of International Arbitration 55.

[105] Which is a proposed name in line with other Latin denominations used for other branches of *lex mercatoria*.

[106] Berger (n 21) 6. See also Toth (n 15) 1-3; Wethmar-Lemmer (n 1) 183; Emmanuel Gaillard, 'Thirty Years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules' (1995) 10 ICSID Review Foreign Investment Law Journal 208; Georges Delaume, 'Comparative Analysis as a Basis of Law in State Contracts: The Myth of The *Lex Mercatoria*' (1989) 63 Tulane Law Review 575, 627; Douglas (n 32) 400; Frischkorn (n 80) 351.

[107] Peter Flanagan, 'Demythologising the Law Merchant: The Impropriety o The *Lex Mercatoria* as a Choice of Law' (2004) 15 (9) International Company and Commercial Law Review 297; Turley (n 23) 475; Petsche (n 72) 508-509; Baron (n 1) 127; Wilkinson (n 6) 112-115; Berger (n 21) 44-149; Howarth (n 72) 46-48.

- The absence of certainty as to the contents of *lex mercatoria*;
- The vague nature of *lex mercatoria*;
- The lack of characteristics to qualify as an autonomous legal system, and, consequently, its failure to constitute a complete normative body;
- The absence of any methodical foundation;
- The lack of procedural legitimacy;
- In the event of the application of *lex mercatoria* in dispute resolution, the rendered decision will be made in equity rather than in law; and
- Reference to *lex mercatoria* in dispute resolution results in uncertainty of the outcome and enforcement and inflicts a more expensive process, which directly contradicts the idea of simplification of international trade.

In analysing the academic literature on this subject, there seems to be an inexhaustible debate between the proponents and opponents of *lex mercatoria*, in which each side sets forth its arguments and strikes down the other side's reasoning. This thesis does not seek to contribute to or terminate the protracted debate over the existence, theoretical and functional suitability of *lex mercatoria* in the modern world by adopting arguments of one side, and thus does not have the objective of dealing with all the criticisms referred to above. However, since this work looks at *lex mercatoria* primarily through the prism of conflict settlement, it is asserted that some findings of this study prove the suitability of *lex mercatoria* for effective dispute resolution.

1.3. New *lex mercatoria*: importance for dispute resolution

International commercial arbitration has played an instrumental part in the establishment of a widespread recognition of the autonomy of transnational commercial law which encompasses the idea of entire displacement of national regulation.[108] Arbitration, as well as other forms of alternative dispute resolution,[109] is crucially important for modern *lex mercatoria* as it reinforces the latter and helps to consolidate its spontaneous evolution by accommodating changes in

[108] Cuniberti (n 23) 374; Jan Dalhuisen, 'Globalization and The Transnationalization of Commercial and Financial Law' (2015) 67 Rutgers University Law Review 19, 55; Jürgen Basedow, '*Lex Mercatoria* and the Private International Law of Contracts in Economic Perspective' (2007) 12 (4) Uniform Law Review 697, 707. In addition, for international trade, international commercial arbitration has been recognised as the dispute settlement on a global basis, even within the fields of international banking and finance practice, which have always been reluctant to use the services of international arbitration, see Berger (n 21) 93.

[109] Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 987; Gbenga Bamodu, 'Extra-National Legal Principles in the Global Village: A Conceptual Examination of Transnational Law' (2001) 4 International Arbitration Law Review 6, 13; Carlo Croff, 'The Applicable Law in an International Commercial Arbitration: Is it Still a Conflicts of Law Problem?' (1982) 16 (4) International Lawyer 613, 634-635.

transaction practices.[110] And similarly in relation to dispute resolution pursuant to *lex mercatoria* in the Middle Ages, contemporary international commercial arbitration is designed in part to reflect the customs, usages and practices of the parties.[111] Therefore, it is not a coincidence that the modern law merchant is intimately associated with arbitration.

Today, despite the ongoing debate over its existence and status as a body of law, *lex mercatoria* is considered as being a legal reality, at least in the area of international commercial arbitration.[112] In fact, nowadays most modern arbitration laws allow the parties to subject their agreement to transnational law rules through the reference to 'rules of law' rather than 'law', and thus authorises them to use *lex mercatoria*.[113] Additionally, most arbitration institutions worldwide allow the parties to choose *lex mercatoria* as applicable rules of law.[114] Furthermore, the arbitral awards based on *lex mercatoria*[115] were recognised and enforced in a number of countries, such as France,[116] Austria,[117] England,[118] Italy,[119] and the USA,[120] and such awards are also urged to be recognised and enforced by the International Law Association.[121]

At the same time, some persuasive empirical evidence showed that the number of cases

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[110] Volckart and Mangels (n 1) 432; Cristián Gimenez Corte, '*Lex Mercatoria*, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement' (2012) 3 (4) Transnational Legal Theory 345, 357; Wilkinson (n 6) 183. At the same time, Goldman argues that the impact of *lex mercatoria* on international trade is much larger than on international arbitration: "[...] new clauses and new types of contracts are set up by international practice, which are not based on municipal legislation, and which are in fact unknown by them: for example, the *hardship clause* and *turnkey contracts*.", see Goldman (n 69) 125.

[111] Trakman (n 68) 266.

[112] Cuniberti (n 23) 380; Ali Abdelrahman Khalil, 'The New *Lex Mercatoria* in the Sudanese Legal System' (2015) 29 (1) Arab Law Quarterly 1, 20; Berger (n 21) 293; Eben Nel, 'The business trust and a Southern African *lex mercatoria*' (2014) 47 (2) Comparative and International Law Journal of Southern Africa 297, 306; Chari Hugo, 'The Legal Nature of the Uniform Customs and Practice for Documentary Credits: *Lex Mmercatoria*, Custom, or Contracts?' (1994) 6 South African Mercantile Law Journal 143, 148; Lando (n 96); Erdem and Süral (n 72). Furthermore, see also Wethmar-Lemmer (n 1) 199: "[...] it may be said with certainty that, as long as international commerce exists, the *lex mercatoria* will exist", and Howarth (n 72) 60: "[...] there is now little uncertainty regarding validity of *Lex mercatoria* as the substantive law in international commercial arbitration."

[113] Petsche (n 72); Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 992. See notable Art 187(1) of the Swiss Federal Act on Private International Law 1987 and Article 1511 of the French Code of Civil Procedure 2007. See also Art. 1054(2) of the Dutch Code of Civil Procedure 1986.

[114] Petsche (n 72) 499. See, for example, the rules of the International Chamber of Commerce, the London Court of International Arbitration, the American Arbitration Association and the Vienna International Arbitration Center.

[115] See, for example, ICC Case No. 7375, Award (1996); ICC Case No. 9875, Award (1999); SCC Case No. 117/1999, Partial Award (1999) as cited in Toth (n 15) 211-217, 232.

[116] *Norsolar SA (France) v. Pabalk Ticaret Ltd. Sirketi (Turkey)* (1985) Cour de cassation, First Civil Chamber, No. 83-11355, *Fougerolle (France) v. Banque du Proche-Orient* (1982) Cour de cassation, Second Civil Chamber, No. 80-15306 as cited in Petsche (n 72) 504; *Primary Coal Incorporated v. Compania Valenciana de Cementos Portland* (1988) Cour d'appel de Paris, No. 5954 as cited in Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 993.

[117] *Norsolor SA v. Pabalk Ticaret Ltd. Sirketi (1983)* Oberster Gerichtshof (Supreme Court of Austria) as cited in Petsche (n 72) 504.

[118] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co and Shell International Petroleum Co. Ltd.* [1987] 2 Lloyds 246.

[119] *Damiano v. Topfer* (Cass. 1982) 105 Foro. It. I 2285, 2288 as cited in Wilkinson (n 6) 113.

[120] See *Ministry of Defence of the Islamic Republic of Iran v Gould, Inc* (887 F2d 1357 (9th Cir 1989) as cited in Petsche (n 72) 505.

[121] Petsche (n 72) 505. However, see Wilkinson (n 6) 113 where the author argues that these limited cases are not significant enough to claim recognition of *lex mercatoria* worldwide. See also Mustill (n 32) 107-109. Toth (n 15) 21: "These rulings may hardly be cited in favour of the existence of an autonomous a-national *lex mercatoria* because they never addressed this issue in the first place". At the same time, some claim that awards made on the basis of *lex mercatoria* have not been set aside by the national courts, see Arenas (n 99) 24; Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 455; Ole Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (1985) 34 International & Comparative Law Quarterly 747, 755.

subjected to *lex mercatoria* in international commercial arbitration is marginal.[122] The data collected from 8,911 commercial arbitration cases at the ICC from 1999 to 2012 showed that commercial parties chose to subject their contract to *lex mercatoria* in less than 2% of cases or, if excluding international sales contracts subject to a specific international treaty, in less than 1%.[123] This might be attributable to the fact that commercial parties are likely to choose national commercial law norms, which exist as a default, rather than claim autonomy from any national law system through *lex mercatoria*.[124]

In another earlier study among attorneys engaged in international commercial law 'virtually everyone' of the lawyers questioned argued strongly against advising their clients to choose *lex mercatoria* as the governing law of their contracts due to the fact that the law merchant is not a definitive and provable law.[125] This study is indicative of the attitude of lawyers to *lex mercatoria*, and, as emphasised by Highet, a practising attorney, it is "impossible to conceive of a draftsman inserting a reference to *lex mercatoria* in an agreement with any sense of confidence that the reference will cover anything more than the very essential rules of reason".[126]

Nevertheless, in a small-scale Kluwer Arbitration Blog online survey on the use of soft law instruments in international arbitration, participants were asked to report on whether they had invoked, used or applied the suggested soft law instruments and concepts, including *lex mercatoria*, when acting as lawyers or arbitrators in international proceedings.[127] Notably, around 50% of the respondents have indicated that they refer to *lex mercatoria* occasionally, around 20% always or regularly refer and around 30% have never referred to it.[128] Importantly, the survey results also revealed that the perception and use of *lex mercatoria* significantly varies depending on geographical region. For example, in the Middle East and Eastern Europe 50% of the respondents indicated that they regularly refer to or apply *lex mercatoria*, whereas

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[122] Michael Pryles, 'Application of the *Lex Mercatoria* in International Commercial Arbitration' (2008) 31 The University of New South Wales Law Journal 319, 329; Cuniberti (n 23) 372; Darlene Wood, 'International Arbitration and Punitive Damages: Delocalization and Mandatory Rules' (2004) 71 (4) Defense Counsel Journal 402, 406.

[123] Cuniberti (n 23) 403. See also Drahozal (n 80) 537-540; Dasser (n 79). However, there is an argument that when parties to international contracts decide to have their contracts governed by transnational rules they rarely use the exact term '*lex mercatoria*', preferring such expressions as "the principles of law and practice prevailing in the modern world" and "the principles of law of a certain country common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law", etc., see Anglade (n 11) 109. Also, Toth suggests that the fact that parties rarely choose *lex mercatoria* to govern their relations is not a reliable indicator of its practical relevance, see Toth (n 15) 196.

[124] Cuniberti (n 23) 375. However, see also Drahozal (n 80) 540: "Or it is possible that agreements giving rise to disputes (which are the only ones included in the data from the ICC) differ systematically from the terms of agreements not giving rise to disputes"

[125] Barton Selden, '*Lex Mercatoria* in European and U.S. Trade Practice: Time to Take a Closer Look' (1995) 2 Annual Survey of International & Comparative Law 111, 113. See also Michaels, 'The True *Lex Mercatoria*' (n 1) 459-460. Although the methodology in these and many other such empirical studies was criticised and the necessity for more empirical studies is highlighted – see, for example, Helen Hartnell, 'Living La Vida *Lex Mercatoria*' (2007) 12 Uniform Law Review 733, 749.

[126] Highet (n 84) 627.

[127] Elina Mereminskaya, 'Results of the Survey on the Use of Soft Law Instruments in International Arbitration' (*Kluwer Arbitration Blog*, 6 June 2014) <http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/> accessed 20 September 2019.

[128] ibid.

only 8.3% respondents from Western Europe stated that they used or applied *lex mercatoria* on a regular basis.[129]

Thus, a striking difference occurs: parties rarely choose *lex mercatoria* to be their governing law and legal practitioners strongly advise against such a choice. Yet, those active in arbitration often invoke, use or apply the law merchant. Importantly, there is a substantial number of arbitral cases cited in academic literature which were decided on the basis of *lex mercatoria* (see the cases cited at the beginning of this section above). Thus, it is clear that the modern perception of *lex mercatoria* is for the most part based around dispute resolution, not least because it offers many benefits to arbitrators: it gives them increased discretion, allows for the avoidance of 'foreign' law, provides for more authority, and reduces legal accountability during the process of decision-making.[130] In fact, the benefits of application of *lex mercatoria* by arbitral tribunals and its positive effect for the commercial parties were identified by several authors.[131]

Given the above, this thesis is based on the premise that the modern law merchant is of crucial importance to and is being primarily used in the context of private dispute resolution. Therefore, in analysing the phenomenon of modern *lex mercatoria* this study primarily looks at it through the perspective of dispute resolution and heavily relies on the evidence collected from several dispute resolution platforms (in particular, see Chapters 4 and 5).

At the same time, as is noted above, it is sometimes claimed by the opponents of *lex mercatoria* that effective dispute resolution on the basis of the law merchant is not feasible and should be avoided. In particular, Schultz stated that effective dispute resolution on the basis of *lex mercatoria* should have the following features: (a) be in sufficient numbers; (b) be publicly available and accessible; (c) have precedential value, either juridical or plainly factual, *i.e. de facto stare decisis.*[132] These features, as he argued, ensure meeting "the inner morality of law"[133] and, when viewed in the context of arbitration practice, *lex mercatoria* has none of them. As Schultz concluded, arbitration awards are rarely published and awards applying *lex mercatoria* are scarce and bear no precedential value, not even a *de facto* precedential force.[134] In fact, this is the prevailing view about arbitration generally: due to the above features no systematic, consistent and coherent legal regulation can be developed by arbitrators.[135]

However, two reservations should be added here. Firstly, there are some specific arbitral

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[129] The authors of the survey connect this to different legal traditions and different styles to conduct arbitration.
[130] Cuniberti (n 23) 410-417.
[131] Dalhuisen, 'Legal Orders and Their Manifestation' (n 91) 133; Petsche (n 72) 505-508; Anglade (n 11).
[132] Thomas Schultz, 'Some Critical Comments on the Juridicity of *Lex Mercatoria*' (2008) 10 Yearbook of Private International Law 667, 703-708; see also similar discussions in Michaels, 'The True *Lex Mercatoria*' (n 1) 456; Cremades and Plehn (n 36) 336-337; Alec Stone Sweet (n 11) 642-643.
[133] Here Schultz relies on the concept developed by Fuller (see Lon Fuller, *The Morality of Law* (revised edn, Yale University Press 1977) 33-41) which describes attributes of a legal system and its normative contents.
[134] Schultz (n 132) 706-708.
[135] Michaels, 'The True *Lex Mercatoria*' (n 1) 455-456.

systems whose functioning includes the features as defined by Schultz. In particular, much academic attention has been dedicated to the activities of the Court of Arbitration for Sport (the CAS) as being the unique arbitration service for sport-related disputes. Notably, CAS awards are publicly available and CAS Panels often refer to previously rendered awards. In fact, it seems prudent to suggest that such features of the CAS arbitration system have significantly contributed to the development of the concept of *lex sportiva* in the area of sport.[136]

Another less known example is maritime arbitration. As will be discussed in this study (see Chapter 4), there are two arbitral centres, namely the London Maritime Arbitrators Association (the LMAA) and the Society of Maritime Arbitrators (the SMA), that carry out around 90% of all maritime arbitration cases.[137] Whilst the degree of publishing their arbitral awards varies markedly, these institutions practise referencing past rendered awards, including to each other's.

Secondly, whilst the majority of authors discussing *lex mercatoria* have concentrated on arbitration, there have been several studies pointing to some other alternative dispute resolution systems which practice *de facto* precedents and regularly publish their dispute resolution outcomes,[138] *e.g.* the innovative platform designed for the resolution of domain name disputes, namely the Uniform Domain Name Dispute Resolution Policy (see Chapter 4). Since its inception it has carried out an impressive number of disputes (likely to be close to 100,000 by the end of 2019 if not earlier) with publication of all of them and heavy reliance on past decisions. Not surprisingly, the functioning of such dispute resolution system gave solid grounds for some scholars to argue for *lex informatica* in the area of cyberspace.[139]

In this thesis an innovative dispute resolution forum, namely Documentary Instruments Dispute Resolution Expertise (DOCDEX), is examined in connection with dispute resolution in trade finance (see Chapter 5). DOCDEX has the same features as other dispute resolution platforms discussed above: all its decisions are published and DOCDEX Panels have developed a

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[136] See, for example, Miloš Galantić, 'Sports Law: Some Introductory Considerations' (2016) 4 (3) Annals of Applied Sport Science 51; Katia Fach Gómez, 'Enforcing Global Law: International Arbitration and Informal Regulatory Instruments' (2015) 47 (1) The Journal of Legal Pluralism and Unofficial Law 112; Matthew Mitten, 'The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World without National Boundaries' (2014) 30 Ohio State Journal on Dispute Resolution 1, 44; Foster (n 101); Richard Parrish, '*Lex Sportiva* and EU Sports Law' (2012) 37 (6) European Law Review 716; James Nafziger, '*Lex Sportiva*' in Robert Siekmann and Janwillem Soek (eds), *Lex Sportiva*: *What is Sports Law?* (T.M.C. Asser Press 2012).

[137] Maurer (n 102) as cited in Thomas Dietz, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade* (Hart Publishing 2014) 205; Miriam Goldby, 'The Performance of the Bill of Lading's functions under UNCITRAL's Draft Convention on the Carriage of Goods: Unequivocal Legal Recognition of Electronic Equivalents' (2007) 3 (13) Journal of International Maritime Law 160, 181; see also Petros Tassios, 'Choosing the Appropriate Venue: Maritime Arbitration in London or New York?' (2004) 21 (4) Journal of International Arbitration 355.

[138] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 (3) Arbitration International 357; Antonis Patrikios, 'Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the *Lex Informatica*' (2006) 38 University of Toledo Law Review 271, 306; Ethan Katsh, 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace' (2006) 10 (3) Lex Electronica 1; Francesca Musiani, *Cyberhandshakes: How the Internet Challenges Dispute Resolution (...And Simplifies It)* (euroEditions 2009).

[139] Patrikios (n 138); Katsh (n 138).

tendency to rely on previous DOCDEX Decisions. Therefore, the functioning of DOCDEX contributes to the argument put forward in this work about the separate branch of *lex mercatoria* in the area of trade finance.

1.4. Key research question and assumptions

The central question of this research is whether a separate branch of *lex mercatoria* in the area of trade finance exists. This challenge is addressed on a step-by-step basis, which includes such stages as: (a) identification of similarities among the well-established branches of modern *lex mercatoria*, *i.e.* what criteria should a branch of modern law merchant comply with; (b) applying the criteria identified to the area of trade finance; (c) closer examination of the functioning of private industry-specific dispute resolution systems in each of the branches of *lex mercatoria* and identification of their similar features; and (d) projecting these features on the area of trade finance and DOCDEX in particular.

Whilst this thesis is focused on the theory of *lex mercatoria* and primarily its use in dispute resolution, there are certain scope limits which need to be outlined at the very beginning. In particular, this study does not intend to provide insights or add to the discussion over some controversial and contested aspects and therefore proceeds with several important assumptions, *i.e.* sides with the supporters of a particular view. These assumptions are as follows.

Firstly, this thesis proceeds on the assumption that *lex mercatoria* does exist and is widely used in international private dispute resolution. Such an assumption is supported by a prevalent view in modern academia and is based on numerous evidence found in academic literature as highlighted above. Therefore, this thesis does not aim to be involved in the debate with regard to the justification of the existence of *lex mercatoria* or contest all arguments against it (however, periodically, some remarks over specific aspects will be made). In fact, the thesis places itself above such a debate in an attempt to examine current and future developments of the new law merchant, both from theoretical and practical viewpoints. Of course, it is difficult to structure properly the accompanying discussion without making reference to either autonomist or integrationist views on *lex mercatoria* (which can be very different regarding certain facets). Thus, whilst this aspect is not of crucial importance for the majority of arguments put forward in this work, the emphasis in this thesis is made on similarities between two views. Moreover, it seems that in recent years another perception of the modern law merchant has emerged which sees the relationship between *lex mercatoria* and domestic law as interdependent and this thesis adds some further insights and support to such a view (in particular, see Chapter 2).[140]

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[140] See, for example, Michaels, 'The True *Lex Mercatoria*' (n 1); Friedrich Juenger, 'The *Lex Mercatoria* and Private International Law" (2000) 60 Louisiana Law Review 1133; Djakhongir Saidov, 'The Standardisation of Oil and Gas Law: Transnational Layers of Governance' (2017) National University of Singapore Centre for Maritime Law Working Paper 2017/017.

Secondly, this thesis does not explore the relationship among such terms as 'transnational law',[141] 'transnational legal order',[142] 'global law',[143] 'bottom-up law-making',[144] 'private law-making',[145] etc., which are similar in many respects and predominantly have the same core idea of shifting powers for the development of effective regulation from states to non-state actors, such as business organisations, arbitral tribunals, traders, bankers, etc. Of course, there are certain differences among these scholarly concepts, but this thesis does not identify them[146] and instead refers to *lex mercatoria* as a theory that unites the above concepts under some common grounds relevant to all of them.

The third assumption is that the modern *lex mercatoria* is divided into branches relevant to specific industries. This phenomenon and the reasons for such a division are further discussed in Chapter 2 herein, but it is crucial to understand that this thesis supports the authors who argue for separation of the modern law merchant rather than an appearance of legal regimes comparable to *lex mercatoria* and which operate alongside it.

The fourth assumption is that the use of *lex mercatoria* in dispute resolution is not restricted to arbitration solely, but could be relevant to all forms of private dispute resolution (provided that certain conditions are present, see the discussion in Chapter 4). It is accepted here that the majority of authors have been exploring *lex mercatoria* exclusively within the realm of international arbitration.[147] Indeed, the establishment of an effective international arbitration framework and its consequent dominance as the main dispute resolution method for cross-border transactions has resulted in the emergence of the modern *lex mercatoria* concept and has sparked some extensive interest in the subject. However, one should not use a narrowly focused arbitration-only approach and ignore other forms of private dispute resolution. In fact, as will be shown in Chapters 4 and 5, some innovative private dispute resolution systems have been designed and successfully function in a mode that places significant reliance on non-state developed regulatory norms, which is representative of the foundational idea of dispute resolution on the basis of *lex mercatoria*.

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[141] Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (n 70).
[142] Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67).
[143] Teubner (n 77).
[144] Janet Levit, 'A Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' (2005) 30 The Yale Journal of International Law 125.
[145] Symeon Symeonides, 'Party Autonomy and Private-Law Making in Private International Law: The Lex Mercatoria that Isn't' in Konstantinos Kerameus (ed), *Essays in honour of Konstantinos D. Kerameus* (Ant. N. Sakkoulas & Bruylant Publishers 2009).
[146] Especially that such task has already been attempted by other scholars, see for example, Bamodu (n 25); Martin Hunter, '*Lex Mercatoria*' (1987) 3 Lloyd's Maritime and Commercial Law Quarterly 277, 278; Alec Stone Sweet (n 11).
[147] See, for example, Elcin (n 31) 186-187; Ciurtin (n 2); Joanna Jemielniak, 'Legitimization Arguments in the *Lex Mercatoria* Cases' (2005) 18 International Journal for the Semiotics of Law 175; Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (n 121); Howarth (n 72) 78-63; Leonid Shmatenko, 'Is *Lex Mercatoria* Jeopardizing the Application of Substantive Law?" in Alexander Bělohlávek, Filip Černý and Naděžda Rozehnalová (eds), *Czech (& Central European) Yearbook of Arbitration: Borders of Procedural and Substantive Law in Arbitral Proceedings (Civil versus Common Law Perspectives)*, volume III (JurisNet 2013).

1.5. Methodology

In carrying out this study I have used a number of research methods. In particular, I have referred to the doctrinal method (which is a defining characteristic of most legal scholarship)[148] when analysing the current stance of *lex mercatoria* in the rules of different dispute resolution centres and their dispute resolution outcomes. The legal doctrinal method is instrumental in analysing the discipline of law.[149] In fact, since the core question of the legal doctrinal method is 'what is law?',[150] this thesis relies heavily on this method.

It is worth noting that this research can also be characterised as qualitative. Whilst qualitative research methods are generally closely associated with the social sciences and humanities rather than law, Webley remarks that many legal researchers (particularly from common law jurisdictions) unconsciously undertake qualitative research when establishing law through the analysis of precedents using documents as source material.[151] Since this research is concerned with the examination of the existence of a separate branch of *lex mercatoria* in the area of trade finance, it could indeed be classified as employing the "qualitative observation" methodology, which, according to Kirk and Miller, is the process of the identification of the presence or absence of something.[152]

As provided by Argyrou, empirical legal research is commonly perceived as complementary to doctrinal research, which can provide valuable insights by obtaining factual data which reveals the limits of institutional action, practical insider attitudes and conceptions and experiences of law and legal institutions.[153] In particular, empirical legal research seeks to capture law in practice through real-life data, thus adding an external perspective of law to the internal one as provided by doctrinal research.[154] Thus, whilst my research cannot properly be classified as empirical, I make use of some limited empirical enquiry when discussing the functioning of different dispute resolution centres. Such research inquiry refers to the amount of caseload, reference to previous decisions, a number of published dispute resolution outcomes by the dispute resolution centres referred to in this thesis, which was collected by me following exacting analysis of such databases as LexisNexis, Lloyd's Maritime Law Newsletter, Trade Finance Channel of the ICC Digital Library, the database of CAS awards, the World Intellectual

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[148] Paul Chynoweth, 'Chapter Three. Legal research' in Andrew Knight and Les Ruddock (eds.), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 37; Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 Erasmus Law Review 130; Wing Hong Chui, 'Chapter 2. Quantitative legal research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 49.

[149] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011) 31.

[150] Chynoweth (n 148) 29.

[151] Lisa Webley, 'Chapter 38. Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (OUP 2010) 926; see also Ian Dobinson and Francis Johns, 'Chapter 1. Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 18-47.

[152] See Jerome Kirk and Marc Miller, *Reliability and Validity in Qualitative Research* (Sage Publications 1986) 9. See also Webley (n 151) 927-928.

[153] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13 Utrecht Law Review 95, 96-97. Sometimes empirical research is referred to as evidence-based or factual approach, see Tom Tyler, 'Methodology in Legal Research' (2017) 13 Utrecht Law Review 113, 113-114.

[154] Argyrou (n 153) 96-97. See similar discussion in Webley (n 151).

Property Organization (the WIPO) Cases and WIPO Panel Decisions database.

This research is not a comparative study. Since any methodology adopted largely depends on and is driven by the research questions defined,[155] the key research question of this study does not require the thesis to employ comparative methods. This is because the discussion in the thesis is generally structured around transnational legal regulation. Consequently, referring to mere comparative methods, whose essence has traditionally been in comparing national legal systems,[156] would likely be insufficient for the proper investigation and comprehensive analysis of the key research question.[157] In addition, the examination of the research question does not necessitate any comprehensive comparisons among national legal systems at micro and macro levels, thus there is no purpose in employing a variety of methodological tools available within the comparative research (*e.g.*, functional method, analytical method, structural method, etc.).[158]

At the same time, as pointed out by van Hoecke, all scholarly research implies comparisons.[159] Therefore, whilst the thesis is not a comparative study, inevitably some comparisons have been made when analysing branches of *lex mercatoria* and the practice of dispute resolution centres referred to herein in order to identify similar features. In particular, such aspects under comparison include the caseload, citation of past decisions and a number of published dispute resolution outcomes.

As per any doctrinal study, this thesis makes extensive use of both primary and secondary legal sources. The primary sources are court cases from several jurisdictions, international conventions, statutes, arbitral awards, DOCDEX and UDRP Panels' decisions, arbitration rules of the CAS, the SMA, the LMAA, DOCDEX Rules, UDRP, ICC-developed uniform rules for documentary instruments (such as the UCP, the URDG, etc.), model contract forms, etc. Secondary sources include published books, peer-reviewed articles, theses, working papers, conference papers, official reports, etc.

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[155] See Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 1, 29.

[156] Edward Eberle, 'The Methodology of Comparative Law' (2011) 16 (1) Roger Williams University Law Review 51, 52; see also Mathias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018) 1-48; Marie Luce Paris, 'Chapter 3. The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016); John Reitz, 'How to Do Comparative Law' (1998) 46 American Journal of Comparative Law 617; Geoffrey Wilson, 'Chapter 6. Comparative Legal Scholarship' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017); Paul Lomio, Henrik Spang-Hanssen and Henrik Wilson, *Legal Research Methods in a Modern World: A Coursebook* (3rd edition, DJØF Publishing 2011).

[157] Stephane Reynolds, 'Comparative Legal Analysis: From the Prevalent Methodology to a Necessary Prerequisite' (2016) 23 (2) Maastricht Journal of European and Comparative Law 366, 372-373. Although see Ralf Michaels, 'Transnationalizing Comparative Law' (2016) 23 (2) Maastricht Journal of European and Comparative Law 352, who argues that it is possible to employ comparative methodology to transnational studies upon reconceptualization of the essence of the comparative method.

[158] Van Hoecke (n 155) 28-29; see also Ralf Michaels, 'Chapter 10. The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006); Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74(2) The Rabel Journal of Comparative and International Private Law 318.

[159] Van Hoecke (n 155) 3.

1.6. Structure of the thesis

In order to address the key question of the existence of a separate branch of *lex mercatoria* in the area of trade finance, this study has also examined the reasons for the evolution of modern *lex mercatoria* into different branches and their similarities, especially in dispute resolution. Therefore, the structure of the thesis is as follows:

Chapter 2 will be dedicated to the analysis of factors that led to the separation of the new *lex mercatoria* into specific branches and the identification of similarities among such branches, which will allow for the elaboration of relevant criteria for being considered as a branch of *lex mercatoria*.

In Chapter 3 I will apply these criteria (except for availability of a leading industry-specific dispute resolution authority in the relevant area, which is separately discussed in Chapter 4) to the area of trade finance in order to test whether there are valid grounds to assume the existence of *lex documentaria commercium* and will analyse how this branch of *lex mercatoria* can be effectively used in practice and specifically assist with the problem of the governing law of documentary instruments (using the example of letters of credit).

Chapter 4 will be dedicated to dispute resolution in branches of *lex mercatoria*. In this Chapter I will apply the last criterion for the recognition of a branch of *lex mercatoria*, namely the availability of a leading industry-specific dispute resolution authority in the relevant area. Following examination of several non-state private industry-specific dispute resolution systems, I will determine their similar features which contribute towards the coherent and consistent development of *lex mercatoria* and its branches.

In Chapter 5 I will examine whether the features identified in Chapter 4 can be relevant to DOCDEX. If DOCDEX has such features like other leading dispute resolution providers in other branches of the modern law merchant, it will satisfy the last criteria for the recognition of *lex documentaria commercium* as a separate branch of *lex mercatoria* in the area of trade finance, namely the availability of a leading industry-specific dispute resolution authority which is capable of ensuring practical relevance and liveliness of the specific branch of modern law merchant.

The thesis will close with Chapter 6 containing a summary of my findings and original contributions to existing academic literature, related limitations encountered during the study and future directions of research.

CHAPTER 2. FRAGMENTATION OF THE NEW *LEX MERCATORIA* INTO BRANCHES

2.1. Introduction

The introductory chapter of this thesis in general terms presented the topic of the study, outlined the key research question and a stage-by-stage plan how the research inquiry would be carried out. Therefore, this chapter proceeds with the initial step of the investigation which is to explore the similarities among different branches of modern *lex mercatoria* and, on the basis of these resemblances, elaborate certain criteria for a branch of the law merchant to be recognised.

As discussed in Chapter 1, two important developments have taken place since the revival of the new *lex mercatoria* theory in the 20th century: the fragmentation of modern law merchant into specific branches (theoretical development) and its growing importance to dispute resolution (practical development). Whilst these two developments are inseparable from each other, this chapter focuses mainly on the theoretical development of the fragmentation of *lex mercatoria*.

In particular, the authors contributing to the debate on modern *lex mercatoria* have observed that, as opposed to the medieval law merchant, this new regime functions not as a whole body, but has fragmented and represents certain industries and areas of a modern economy.[160] In each of these areas there are specific customs and usages as well as other sources,[161] whilst general principles of *lex mercatoria* are being applied too. Thus, the discussion in this chapter will be based around the analysis of scholarly contributions of authors arguing for the existence of a specific branch of *lex mercatoria* relevant to a certain industry. Specifically, the focus will be on four branches of the modern law merchant which have received some significant attention in academic literature in such industries as maritime (*lex maritima*), sport (*lex sportiva*), internet (*lex informatica*)[162] and oil and gas (*lex petrolea*). Therefore, this chapter is limited solely to the examination of and search for similarities within these four branches due to the wealth of scholarly literature available and, consequently, more grounds for comprehensive analysis and comparisons.

In order to understand and identify the similarities between the branches of the new *lex mercatoria*, it is crucial to comprehend where to begin the search for such similarities. I suggest starting from the very reasons that led to the revival of the theory of *lex mercatoria* in the second half of the 20th century. Examination of these reasons will facilitate an understanding of the background to the fragmentation of the modern law merchant into specific branches and

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[160] Eric Ip, 'Globalization and The Future of The Law of The Sovereign State' (2010) 8 (3) International Journal of Constitutional Law 636, 645.

[161] Ank Santens and Romain Zamour, 'Dreaded Dearth of Precedent in the Wake of International Arbitration - Could the Cause also Bring the Cure?' (2015) 7 Yearbook on Arbitration and Mediation 73; Maniruzzaman (n 99) 668-669; Arenas (n 99) 19.

[162] Sometimes also referred to as *lex electronica*.

to form certain starting points for making comparisons among these branches.

Based on the identified similarities, this chapter will conclude with the suggested non-exhaustive list of criteria to which a branch of *lex mercatoria* should correspond. These criteria will be further applied in Chapter 3 to the area of trade finance to establish the reasonableness of the proposition for the existence of a separate branch of *lex mercatoria* (with a proposed name of *lex documentaria commercium* in line with other Latin denominations used for other branches) in that specific area.

2.2. Reasons for the fragmentation of the new *lex mercatoria*

The reasons for the fragmentation of the new *lex mercatoria* can generally be traced and connected to the factors that contributed to the appearance of the new law merchant in the second half of the 20th century. In particular, Khademan attempted to summarise the reasons for the re-emergence of the new *lex mercatoria* and listed several factors that contributed to the appearance of the doctrine after World War II, such as (a) economic integration; (b) technological advances; (c) birth of new states; (d) role of formulating agencies; and (e) role of legal scholars.[163] Some appealed to the dissatisfaction of traders by the need to deal with various national laws and the problem of a conflict of such regimes during cross-border activities.[164] Many other scholars, who analysed the phenomenon of the revitalisation of *lex mercatoria* from a strictly legal point of view, typically add another important factor, namely the establishment of a global arbitration framework (via the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966), which allowed traders to avoid national litigation.[165] In essence, all the above factors are more or less interrelated and to some extent have contributed to the re-emergence and development of the new *lex mercatoria*. They cannot be viewed independently of each other.

2.2.1. Globalisation and technical advances

Economic integration in the second half of the 20th century is closely associated with globalisation trends. Whilst many argue that globalisation has roots from the early 19th century,[166] arguably its most intensive stage happened after the end of World War II.[167] Despite

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[163] Mahmood Khademan, 'Documentary Letters of Credit and Related Rules Under International Trade Law: A Case For Action' (PhD Thesis, University of Glasgow 1996) 310-314.

[164] See, for example, Mazzacano (n 16) 14; Rodríguez (n 72); Cremades and Plehn (n 36) 323-327.

[165] See, for example, Cuniberti (n 23) 374-375; Alec Stone Sweet (n 11) 637-638; Yildirim (n 83) 5-6; Mazzacano (n 16) 13-14.

[166] Kevin O'Rourke and Jeffrey Williamson, 'When Did Globalisation Begin?' (2002) 6 European Review of Economic History 23; Christopher Bayly, *The Birth of the Modern World, 1780-1914: Global Connections and Comparisons (Blackwell History of the World)* (Wiley-Blackwell 2004).

[167] Shale Horowitz, 'Restarting Globalization After World War II: Structure, Coalitions, and The Cold War' (2004) Comparative Political Studies 127; Jean-Bernard Auby, *Globalisation, Law and the State* (Hart Publishing 2017) 5-9; World Trade Organization, 'World Trade Report 2008: Trade in a Globalizing World' (2008) 15-24; Akira Iriye, *Global Interdependence: The World After 1945* (Harvard University Press 2014).

the term globalisation being used very often, there is no uniform approach towards its definition. This is largely because globalisation can be viewed from different perspectives and analysed from a variety of backgrounds, but primarily from economic, cultural and social dimensions.[168] At the same time, from an economic perspective, many associate globalisation with or include into its core elements the aspects of modern technological progress and growth of international trade and volumes of capital flows.[169]

Given that cross-border trade is the core object of commercial law and respective regulation, it is no surprise that law and its development has been considerably influenced by globalisation processes.[170] In fact, it is commonly agreed that globalisation has a significant impact on law and gave rise to the establishment of new legal forms and regimes, including the new *lex mercatoria*.[171] Nowadays it is difficult to think of any area of law, which has remained unaffected by globalisation, with the most prominent examples of trade, finance, banking, internet regulation, human rights, environmental protection, etc.[172]

Not least the strong pace of globalisation processes is aided by rapid technological improvements. Technological advances, especially in information and communication technologies as well as vast improvements in transportation, has undoubtedly changed, shaped and facilitated international trade and financial flows.[173] Furthermore, scientific developments have also influenced the landscape of available commercial activities. Thus, modern merchants operate in a variety of sectors of the modern economy (as opposed to the landscape of commercial activities in the Middle Ages when the trade in goods was the dominant, if not single one).[174] This has resulted in the merchants' high organisation into

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[168] Stephen McBride and John Wiseman (eds), *Globalization and its Discontents* (Palgrave Macmillan 2000) 1-6; Auby (n 167) 2-5; Michaels, for example, distinguishes three different types of view on globalisation: as reality, as theory and as ideology and mentions the new *lex mercatoria* within the ideology perception of globalisation, see Ralf Michaels, 'Globalization and Law: Law Beyond the State' in Reza Banakar and Max Travers (eds), *Law and Society Theory* (Hart Publishing 2013).

[169] Julian Di Giovanni and others, 'Globalization: A Brief Overview' (*International Monetary Fund*, May 2008) <https://www.imf.org/external/np/exr/ib/2008/053008.htm> accessed 20 September 2019; Christine Lagarde, 'Making Globalization Work for All' (*International Monetary Fund*, 13 September 2016) <http://www.imf.org/en/News/Articles/2016/09/13/sp09132016-Making-Globalization-Work-for-All> accessed 20 September 2019; Auby (n 167) 47-51; Lawrence Friedman, 'One world: notes on the emerging legal order' in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths LexisNexis 2002) 24.

[170] Auby (n 167) 47-48.

[171] William Twining, *Globalisation and Legal Scholarship: Montesquieu Lecture 2009 (Tilburg Law Lectures)* (Wolf Legal Publishers 2011) 29; Francis Snyder, 'Economic Globalization and the Law in the Twenty-First Century' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2008) 624-626; Karl-Heinz Ladeur, 'Globalization and Public Governance – A Contradiction?' in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalisation* (Routledge 2004) 2; Auby (n 167) 16-19.

[172] Auby (n 167) 29-64.

[173] Volckart and Mangels (n 1) 429. Although Ladeur argues that technological innovations, even though interdependent and mutually reinforcing within the process of globalisation, should not be included as one of the core elements of the latter, see Ladeur (n 171) 4.

[174] See generally Sophus Reinert and Robert Fredona, 'Merchants and the Origins of Capitalism' (2017) Harvard Business School Working Paper 18-021 <https://www.hbs.edu/faculty/Publication%20Files/18-021_b3b67ba8-2fc9-4a9b-8955-670d5f491939.pdf > accessed 20 September 2019.

specialised communities depending on the area of their activities.[175] These communities are often organised into private associations that have gradually transformed into important and powerful actors on the international arena which represent the interests of traders active in a particular sector of the contemporary economy.[176]

2.2.2. The rise in importance of private industry associations

The widespread organisation of merchants into private associations has signalled another important development: the transformation of the role of a state which is no longer the exclusive creator of legal norms with many private associations developing rules and standards of conduct for their community members.[177] This is the direct effect of polycentric globalisation processes which, aided by technological developments, have immensely increased the world's transitivity and weakened the nation states whilst increasing the strength of markets, thus having a significant and unprecedented influence on legal regulation.[178] Non-state private industry associations and the significance of their generated legal norms (recognised by states as valid frameworks for regulation of economic relations)[179] are a clear example of the rising power of markets, which many consider to be an indication of the new *lex mercatoria* in action.[180]

The above described trends of globalisation in combination with technical progress and harmonisation of law since the second half of the 20th century have resulted in the establishment of powerful industry associations with their developed set of regulations for actors in a particular sector.[181] While technically operating under state laws, these industry associations have played an important role in setting industry standards, clarifying existing and developing new practices or sometimes even influencing states to adopt certain sets of regulations on the basis of their own issued legal instruments.[182] Such instruments do not require any formal approval from a state and in many cases exist without any official national

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[175] John Dunning, *The Globalization of Business: The Challenge of the 1990s* (Routledge 2014); Robert Cooter, 'The Theory of Market Modernization of Law' (1996) 16 (2) International Review of Law and Economics 141, 147; Volckart and Mangels (n 1).

[176] Volckart and Mangels (n 1); Cremades and Plehn (n 36) 325.

[177] Ralf Michaels and Nils Jansen, 'Private Law Beyond the State - Europeanization, Globalization, Privatization' (2006) 54 The American Journal of Comparative Law 843, 868; Auby (n 167) 15; Ralf Michaels, 'The Re-State-Ment of Non-State Law: the State, Choice of Law, and the Challenge From Global Legal Pluralism' (2005) 51 The Wayne Law Review 1209, 1210-1211; see also Paul Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law 485, 507-511, 538-540.

[178] Auby (n 167) 5-9; Bayly (n 166); Michaels, 'Globalization and Law' (n 167); Snyder (n 171) 630.

[179] Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 1024.

[180] Michaels, 'Globalization and Law' (n 167); Snyder (n 171) 634.

[181] Auby (n 167) 68-69; John Flood, 'Capital Markets, Globalisation and Global Elites' in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths LexisNexis 2002) 116.

[182] Ip (n 160) 637. Michaels, for example, suggests a typology of three ways, besides rejections, in which the state deals with non-state norms, namely incorporation, delegation and deference, see Michaels, 'The Re-State-Ment of Non-State Law' (n 177) 1228-1235.

or international recognition, but nevertheless are extensively and successfully used.[183]

Perhaps one of the most significant benefits of these private associations is that they undertake careful analysis of existing practices and usages in the field to produce a reliable and up-to-date instrument representing the current state of affairs in a particular industry and addressing the most common aspects. These industry associations are naturally better placed than governments to observe the respective business developments in their specialised field.[184] Therefore, as long as legal instruments and norms produced by private industry associations are accepted by industry players and extensively used by them, such instruments represent the essence of the modern *lex mercatoria*.

There are two primary examples of how private industry associations influence international commerce. Firstly, they are involved in the development of standard (model) form contracts.[185] In fact, in some industries standard form contracts are used for virtually all transactions.[186] As discussed in section 1.1.2 of Chapter 1, many authors recognise standard form contracts as an integral source of the modern law merchant as these contracts are clearly a legal instrument of non-state origin. Indeed, the main purpose of any model contract is to meet a clearly defined need and to create an instrument that will universally be accepted and used in the industry.[187] It is difficult to disagree that model contracts, at the very least, provide a solid basis, structure, conceptual and legal language for many if not most transactions, commonly used as a starting point in any negotiations, periodically revised and updated and provide common solutions to typical problems, which results in increased harmonisation in the area.[188]

Secondly, industry associations exercise considerable influence on commercial parties through the development of rules for certain particular aspects of commercial operations, such as the Uniform Customs and Practice for Documentary Credits, INCOTERMS and the Uniform Rules for Sea Waybills, etc.[189] Some of these have achieved universal recognition through

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[183] Bryan Druzin, 'Towards a Theory of Spontaneous Legal Standardization' (2017) 8 (3) Journal of International Dispute Settlement 403, 421; Bryan Druzin, 'Why does Soft Law Have any Power Anyway?' (2017) 7 Asian Journal of International Law 361, 373; Ip (n 160) 645.

[184] Florian Moslein, 'Regulatory Competition between Public and Private Rules' in Horst Eidenmuller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart Publishing 2013) 151. More comprehensive analysis can be found in the monograph by Moslein, which is written in German, see Florian Moslein, *Dispositives Recht: Zwecke, Strukturen and Methoden* (Mohr Siebeck 2011).

[185] Volckart and Mangels (n 1) 430-431.

[186] Such as in the maritime industry, see Calliess and Klopp (n 98) 8; Thomas Carbonneau, 'Chapter 7. Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce' in Thomas Carbonneau, *Carbonneau on International Arbitration: Collected Essays* (Juris Net LLC 2011) 252 at note 174.

[187] Timothy Martin and Jay Park, 'Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger' (2010) 3 (1) Journal of World Energy Law & Business 4, 38.

[188] ibid 8-14. For a more detailed discussion on benefits and drawbacks of model contracts in the petroleum industry see Saidov (n 140) 15; Timothy Martin, 'Model Contracts: a Survey of the Global Petroleum Industry' (2004) 22 (3) Journal of Energy & Natural Resources Law 284; Talus, Looper and Otillar (n 100) 185-192: however, here the authors have noted that it is not possible to provide model contracts for host government contracts because such contracts are country specific, which, nevertheless, does not imply that such contracts do not share many if not most provisions with other widely used model contracts.

[189] Volckart and Mangels (n 1) 430-431. See also the UNIDROIT Principles of International Commercial Contracts 2010.

endorsement by the United Nations or inclusion by way of a direct reference in national legislation.[190]

The above activities of industry-specific associations resulted in a massive number of legal norms being created alongside the state.[191] Whether *all* or just *some* of these new legal norms can successfully qualify as being a part of the new *lex mercatoria*,[192] the shift in legal norm-making is evident and leads to the fact that nowadays state regulation is not the exclusive law maker, thus indicating a change from territorial to global sector-specific functional fragmentation.[193] This indeed is a representative illustration of the theoretical basis of *the law merchant*.

Thus, as claimed by Wielsch and Collins, in the 21st century, unlike in the Middle Ages, there is essentially little or no place for unwritten or uncodified usages and practices, because these are substituted by soft law instruments produced by private industry associations.[194] Clearly, this brings great benefits both to the commercial actors (easy access to codified documents) and dispute resolution practitioners (arbitrators and judges have some sort of tangible source and have more comfort in referring to it rather than using some undocumented evidence).[195]

2.2.3. Support of states and international community (co-existence of new *lex mercatoria* and state developed law)

Nevertheless, despite the above developments with regard to the importance and authority of private industry associations and their developed regulatory instruments, private regime issued regulations cannot function independently of the state.[196] This is especially visible in such aspects as recognition and enforcement of certain privately developed regulations as these to a large extent need to conform to general rules set by the state.[197] Moreover, in some areas, such as taxation, these private regulations cannot be valid *per se*.[198] At the same time, private industry associations have developed a vast array of legal instruments which significantly aid commercial parties in carrying out their relations, regularly referred to by arbitral tribunals and

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[190] See endorsement of UNCITRAL of the Uniform Rules for Forfaiting (2017), the Uniform Rules for Demand Guarantees (2010), INCOTERMS 2010 (2010), the UNIDROIT Principles of International Commercial Contracts (2010), the Uniform Customs and Practices for Documentary Credits (UCP 600) (2007) and International Standby Practices (ISP98) (1998). See also article 5 of the US UCC which refers to the Uniform Customs and Practice for Documentary Credits.

[191] Gunther Teubner, 'Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector in World Society?' in Karl-Heinz Ladeur (ed), *Globalisation and Public Governance* (Ashgate Aldershot 2004).

[192] ibid.

[193] Dan Wielsch, 'Global Law's Toolbox: How Standards Form Contracts' in Horst Eidenmuller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart Publishing 2013) 72.

[194] ibid 76-78; Hugh Collins, 'Regulatory Competition in International Trade: Transnational Regulation through Standard Form Contracts' in Horst Eidenmuller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart Publishing 2013) 123, 132-133.

[195] Also, states seem to prefer to recognise codified sources of private law origin due to their similarity in form and substance to state-made law, see Michaels and Jansen (n 177) 871.

[196] Cremades and Plehn (n 36) 329-330, 347.

[197] Wielsch (n 193) 103; Moslein, 'Regulatory Competition between Public and Private Rules' (n 184) 150; Collins (n 194) 122; Cremades and Plehn (n 36) 333-335.

[198] Moslein, 'Regulatory Competition between Public and Private Rules' (n 184) 148.

national courts and which are widely recognised by states and the international community, even when not formally being validated by them. Thus, in the pursuit of the effective regulation of commercial activities there seems to be a certain level of interdependence between privately developed norms and state law-making.

It is also worth mentioning that not every private industry association can be regarded as an effective developer of private regulation for the sector. Naturally, the norms produced by such an association (and, consequently, its authority) should be followed and respected by the relevant community of traders. However, for the new *lex mercatoria* it is also vitally important that such norm-making activity receives support from states and the international community. The states, having recognised the benefits of private industry law-making, nonetheless exercise the ultimate control as to which privately developed norms can be approved (or, at least, permitted to exist) and which should be rejected. In particular, pursuant to the typology suggested by Michaels, states can proceed with four approaches towards non-state developed norms:[199] (a) rejection by denying the possibility of any non-state regulation in the area; (b) incorporation by the transformation of non-state developed norms into national legislation; (c) deference by the transformation of non-state developed norms into facts; and (d) delegation by the transformation of non-state norms into subordinated law. As he further provides:

> "Incorporation is a direct reaction (through translation) to non-state normativity. Delegation will be granted only if (and because) the state is convinced that non-state community self-regulation is superior to state regulation, typically in reaction to the community's request to be allowed to regulate itself. Deference is the acknowledgment that regulation through state law is contingent on facts, including facts that individuals can freely determine."[200]

Michaels also emphasised that whilst the state has retained its monopoly on the recognition of law, under the globalisation process it is no longer the exclusive producer of legal norms and actively conceptualises privately developed regulation.[201] Thus, regulation produced by private industry associations often becomes "equal, at times even superior to those of the state."[202]

Given the above, it seems that today there is no useful purpose in comparing the new *lex mercatoria* with state law, or pointing out any benefits and drawbacks of either, etc, because, in essence, there is no competition between these two creatures and the conventional distinction is fading under globalisation processes.[203] As rightfully mentioned by critics, the enforcement of arbitral awards based on *lex mercatoria* would not be possible without state law, so, to some extent, the whole existence of the concept's functioning depends on state

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[199] Michaels, 'The Re-State-Ment of Non-State Law' (n 177) 1228-1235.
[200] ibid 1236.
[201] ibid.
[202] ibid; see also Saskia Sassen, *Losing Control? Sovereignty in The Age of Globalization* (Columbia University Press 1996) 27-33.
[203] Ip (n 160) 654-655.

law.[204] Therefore, to achieve greater efficiency, the modern *lex mercatoria* and state law should be seen as vitally important to and mutually dependent on each other.[205] This in turn results in an important criterion for recognition of a separate branch of the modern law merchant, namely public (state) acceptance of and non-interference in the norms produced by private industry associations in certain areas. In fact, there are some evident cases wherein the new *lex mercatoria* and state law co-exist even within the same organisation, leading to the appearance of such phenomena as hybrid organisations and regulation within the branches of the new *lex mercatoria*.[206]

Here it is correct to employ the allegorical parallel with athletics made by Collins to illustrate the relations between transnational law and state made law: to choose the former is to win a middle distance race, whereas the choice of the latter is more beneficial for a long distance race, but winning one of those races gives no indication about one's ability to win the other distance.[207] Today, advocating for complete autonomy of the new *lex mercatoria* from state law is not helpful and is in fact counterproductive. It would be pointless simply to transplant the completely autonomous medieval *lex mercatoria* into the modern setting with long-established law-making powers by states: the historical model and presumptions and presuppositions it was based on is no longer valid, *i.e.* the old concept must be rethought and modified to adjust to modern world demands and settings.[208] Otherwise, the risk of claiming the complete and whole autonomy of the new *lex mercatoria* from state law leads to the practical uselessness of the theory, leaving it alive only in academic treatises. Therefore, state support, acceptance and non-interference in the norms produced by private industry associations in certain areas is an important indication of recognition of the modern law merchant, its effectiveness and robustness. Consequently, this development has resulted in the impact of non-state developed regulation in certain areas more significant, thus contributing to the phenomenon of separation of *lex mercatoria* into branches.

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[204] Auby (n 167) 21, 48-49.

[205] Saidov (n 140) 35-36; Thomas Ackermann, 'Private Production of Transnational Regulation through Standard Form Contracts' in Horst Eidenmuller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart Publishing 2013) 145-146. To some extent this idea was also expressed by Santosm Boaventura de Sousa in his article 'State, Law and Community in the World System: An Introduction' (1992) 1 Social & Legal Studies 131,135; Twining (n 171) 41-42; Ladeur (n 171) 2; Michaels, 'Globalization and Law' (n 167); Auby (n 167) 70; Stephan Hobe, 'Globalisation: A Challenge to The Nation State and to International Law' in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths LexisNexis 2002) 388.

[206] Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005) 24; Zaki Laidi, *La Norme Sans La Force. L'enigme De La Puissance Europeenn* (Presses de Sciences Po 2008) as cited in Auby (n 167) 71.

[207] Collins (n 194) 130.

[208] Ralf Michaels and Jansen (n 177) 873, 886.

2.2.4. Rise of industry-specific dispute resolution[209]

Regarding dispute resolution, it is often emphasised that the establishment of a global arbitration framework was one of the reasons for the emergence of the new *lex mercatoria*. Indeed, nowadays arbitration is the most widely used method for resolving cross-border disputes.[210] Moreover, litigation in national courts is considered by commercial parties to be the least attractive option.[211]

As mentioned in section 1.3 of Chapter 1, the revival of the theory of *lex mercatoria* has had a significant impact on alternative dispute resolution laws and rules. Nowadays most modern arbitration laws allow the parties to subject their agreement to *lex mercatoria* through reference to 'rules of law' rather than 'law',[212] and most arbitration institutions worldwide permit the parties to choose *lex mercatoria* as applicable rules of law.[213] Therefore, despite the debate over the elements and theoretical nature of the modern law merchant, *lex mercatoria* is a legal reality in international commercial arbitration[214] with a number of arbitral awards on its basis recognised and enforced in a variety of jurisdictions.[215]

However, the development does not stop there. In the last couple of decades there has been

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[209] Hereinafter similar terms such as industry-specific, sector-specific and/or sector-specialised dispute resolution are used as synonyms and refer to dispute resolution centres specialising in rendering services of conflict resolution exclusively in a particular sector of the economy.

[210] White & Case and Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (9 May 2018) <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> accessed 20 September 2019.

[211] ibid.

[212] Petsche (n 72) and Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 992. See notable Art 187(1) of the Swiss Federal Act on Private International Law 1987 and Article 1511 of the French Code of Civil Procedure 2007. See also Art. 1054(2) of the Dutch Code of Civil Procedure 1986.

[213] Petsche (n 72) 499. See, for example, the rules of the International Chamber of Commerce, the London Court of International Arbitration, the American Arbitration Association and the Vienna International Arbitration Center.

[214] Cuniberti (n 23) 380; Khalil (n 112) 20; Berger (n 21) 293; Nel (n 112) 306; Hugo (n 112) 148; Lando, 'The Law Applicable to The Merits of the Dispute' (n 96); Erdem and Süral (n 72). Furthermore, see also Wethmar-Lemmer (n 1) 199: "[...] it may be said with certainty that, as long as international commerce exists, the *lex mercatoria* will exist"; Howarth (n 72) 60: "[...] there is now little uncertainty regarding validity of *Lex mercatoria* as the substantive law in international commercial arbitration."

[215] See, for example, ICC Case No. 7375, Award (1996), ICC Case No. 9875, Award (1999), SCC Case No. 117/1999, Partial Award (1999) as cited in Toth (n 15) 211-217, 232; *Norsolar SA (France) v. Pabalk Ticaret Ltd. Sirketi (Turkey)* (1985) Cour de cassation, First Civil Chamber, No. 83-11355, *Fougerolle (France) v. Banque du Proche-Orient* (1982) Cour de cassation, Second Civil Chamber, No. 80-15306, *Norsolor SA v. Pabalk Ticaret Ltd. Sirketi* (1983) Oberster Gerichtshof (Supreme Court of Austria), *Ministry of Defence of the Islamic Republic of Iran v Gould, Inc* (887 F2d 1357 (9th Cir 1989) as cited in Petsche (n 72) 504; *Primary Coal Incorporated v. Compania Valenciana de Cementos Portland* (1988) Cour d'appel de Paris, No. 5954 as cited in Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 993; *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co and Shell International Petroleum Co. Ltd.* [1987] 2 Lloyds 246; *Damiano v. Topfer (Cass. 1982) 105 Foro. It. I 2285, 2288* as cited in Wilkinson (n 6) 113. Such awards are also urged to be recognised and enforced by the International Law Association, see Petsche (n 72) 505. However, see Wilkinson (n 6) 113 where the author argues that these limited cases are not significant enough to claim recognition of *lex mercatoria* worldwide. Similarly on this point, see also Mustill (n 32) 107-109; Toth (n 15) 21: "These rulings may hardly be cited in favour of the existence of an autonomous a-national *lex mercatoria* because they never addressed this issue in the first place". At the same time, some claim that awards made on the basis of *lex mercatoria* have not been set aside by the national courts, see Arenas (n 99) 24; Lew, Mistelis and Kröll (n 121) 455; Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (n 121) 755.

an increase in the establishment of sector-specialised conflict resolution centres.[216] This trend is mainly driven by the efficiency of such industry-specific dispute resolution, which is achieved by (a) specially tailored procedural rules that take into account nuances and details characterising disputes in a particular industry; and (b) maintaining the pool of available decision makers with many years of practical experience who are specialists in the specific sectors of the economy.[217] However, this research shows that industry-specific dispute resolution, at least in certain sectors, is much more sophisticated than has been hitherto perceived. As my conducted analysis shows, in many branches of modern *lex mercatoria* there is a leading dispute resolution authority which carries out the majority of disputes in the field, determines them via extensive application of industry-related principles, customs and usages, and, more importantly, develops new norms through consistent and accessible publication of dispute outcomes and reference to past rendered decisions. These features make industry-specific dispute resolution substantially different from general alternative dispute resolution centres, especially those in arbitration. Not surprisingly, the functioning of industry-specific conflict resolution authorities has become intimately associated with *lex mercatoria* and its branches.

Given the importance of dispute resolution to the theory of *lex mercatoria*, the availability of a leading dispute resolution authority in a particular industry sector should be considered as a vitally important pre-requisite for a branch of the modern law merchant. Moreover, such a dispute resolution centre should have certain features which would allow for the development of a consistent and coherent body of law. Namely, such features include reference to past rendered decisions and publication of dispute resolution outcomes in an accessible manner.[218] Therefore, the aspect of dispute resolution in the branches of *lex mercatoria* requires the utmost attention and will be analysed separately in Chapter 4. In addition, Chapter 5 will deal specifically with dispute resolution in the branch of *lex mercatoria* in the area of trade finance.

2.3. Branches of the new *lex mercatoria*

As discussed above, modern *lex mercatoria* is different from its medieval predecessor in several respects, most notably because of the changed role of the state and the variety of activities available to those involved in commerce and trade. In the modern era, the discovery of new natural resources (*e.g.*, oil and gas, shale gas, alternative energy sources, etc.), technological achievements (*e.g.*, the invention of computers and cyberspace, creation of the intellectual property concept, etc.) and the creation of the whole new unique areas of

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[216] Łukasz Gembiś, 'Are We Dealing with the Trend of Specialised Arbitration?' (*Kluwer Arbitration Blog*, 9 May 2016) <http://arbitrationblog.kluwerarbitration.com/2016/05/09/are-we-dealing-with-the-trend-of-specialised-arbitration/> accessed 20 September 2019.

[217] ibid.

[218] See, for example, Alec Stone Sweet (n 11) 642: "[...] I consider this to be the crucial move, [that] the *Lex mercatoria* is now being built through precedent".

commercialised activities (*e.g.*, sport) has led to the recognition that simple transplantation and application of the medieval concept to modern realities would not suffice.

Therefore, considering the diversity of contemporary commercial activities, a significant number of scholars have been indicating that unlike its medieval predecessor, modern *lex mercatoria* is fragmented and comprises several branches depending on the industry or field where its norms apply. Each of these branches has its own unique customs and usages as well as other sources,[219] while the general principles of *lex mercatoria* continue to be applied. In particular, there is a considerable array of literature available on *lex petrolea* in the field of the petroleum industry,[220] *lex sportiva* in regard to sport,[221] *lex maritima* in relation to maritime matters[222] and *lex informatica* (also known as *lex electronica*) in the area of electronic transactions and Internet regulation.[223] The following sections elaborate on the existing academic literature discussing these branches of the new *lex mercatoria* and identify certain similarities among them in the light of the reasons for fragmentation of the modern law merchant. On the basis of such similarities certain criteria for recognition of a branch of *lex mercatoria* will thereafter be elaborated. These criteria will be further applied to the area of trade finance for the purpose of examination of the existence of *lex documentaria commercium* as a separate branch of *lex mercatoria* in the area of trade finance.

2.3.1. Areas of the new *lex mercatoria*

The areas of application of the new *lex mercatoria* represent relatively new fields, except for the maritime industry. *Lex maritima*, or shipping law, has always enjoyed a unique position as a distinct branch of commercial law, which organically evolved from the medieval *lex mercatoria*[224] and is a subset of *lex mercatoria* applicable for sea trade. *Lex maritima* possibly takes its roots from an unwritten body of sea law emanating from the Island of Rhodes, later named as the Rhodian law, at around the 8th or 9th century BC, which was later recorded in the Digest of Justinian.[225] Later uniform regional regulation and standards for maritime matters were introduced in the Rules of Oleron, Consolato del Mare, the Rules of Visby, regulations of the Hanseatic League, Mare Liberum, etc.[226] *Lex maritima* was relatively uniform, at least in Western Europe, as opposed to other types of law, and its influence was somewhat increased

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[219] Maniruzzaman (n 99) 668-669; Arenas (n 99) 19.
[220] See Martin, '*Lex Petrolea* in International Law' (n 100); Childs (n 100); Talus, Looper and Otillar (n 100); Tabari (n 100); Bishop (n 100).
[221] See Siekmann and Soek (n 101); Foster (n 101); Siekmann (n 101); Kolev (n 101).
[222] Maurer (n 102); Tetley (n 102).
[223] Trakman (n 68); Marrella and Yoo (n 103); Mefford (n 103); Reidenberg (n 103); Rowe (n 103); Reams (n 103).
[224] Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 2 at 1.05.
[225] Tetley (n 102) 109; George Potter, 'The Sources, Growth and Development of the Law Maritime' (1902) 11 (3) The Yale Law Journal 143, 145-146; Gordon Paulsen, 'Historical Overview of the Development of Uniformity in International Maritime Law' (1982-1983) 57 Tulane Law Review 1065, 1068-69.
[226] Paulsen (n 225) 1069-1073; Austin Wright, 'Uniformity in the Maritime Law of the United States' (1925) 73 (2) University of Pennsylvania Law Review 123, 126.

following its codification and formalisation.[227] As was drolly noted by Druzin, "while *lex mercatoria* for the most part spanned across Europe, the *lex maritima* spilled across the oceans". [228]

However, as is the case with *lex mercatoria*, legal nationalism in the 19th century is said to have destroyed this long-established uniformity.[229] Nevertheless, in contrast to the development of *lex mercatoria*, whilst commonly, national courts have absorbed the matters heard by merchant courts, in many countries special maritime (or admiralty) courts have remained, thus preserving *lex maritima* to some extent.[230] For example, in the beginning of the 20th century Potter noted that it was an absolute necessity for an admiralty lawyer to know and understand the sources, nature, scope and character of maritime law, which had been developing for over three thousand years.[231] Moreover, he highlighted the criticism that was expressed towards contemporary American judges who did not take into consideration this long-established body of law.[232] Potter also extensively referred to Lord Mansfield and Judge Story (two prominent supporters of *lex mercatoria* and *lex maritima*) to illustrate the advantages of reference to these two sources.[233]

In fact, at first glance it is not easy to spot any major difference between *lex mercatoria* and *lex maritima*. Upon analysis of the relationship between *lex mercatoria* and *lex maritima* most academics view it as between genus and species, and the interchangeable arguments regarding their autonomous existence are often used by the proponents of both concepts.[234] However, Alba points out that *lex maritima*, unlike *lex mercatoria* which is predominately based on contract and business matters, is to a large extent shaped by "the sea as a medium with its peculiar and increased risks and its unconfined nature as a space".[235] Additionally, it is also asserted that the maritime industry provides more numerous and diverse examples of the instruments for self-regulation for identification of trade usages and customs than any other industry.[236] In line with this, Tetley notes that *lex maritima* is composed of "the maritime customs, codes, conventions and practices from the earliest times to the present, which have had no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute".[237]

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[227] Tetley (n 102) 109-110, 113; see also Paulsen (n 225) 1067; Wright (n 226) 127.
[228] Bryan Druzin, 'Spontaneous Standardization and the New *Lex maritima*' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 72 at 4.15.
[229] One of the reasons of such legal nationalism in the maritime industry is that sea commerce and trade generated a substantial amount of wealth, which governments sought to control, see Paulsen (n 225) 1065, 1067.
[230] Wright (n 226) 127.
[231] Potter (n 225).
[232] ibid.
[233] ibid.
[234] Manuel Alba, 'Maritime Arbitration in Spain: the Delocalization of Dispute Resolution and the Shrinking Recourse to Arbitration' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 158 at 10.05.
[235] ibid.
[236] ibid 163 at 10.15.
[237] Tetley (n 102) 108.

In contrast, the other alleged branches of the new law merchant are relatively new and represent a direct result of modern internationalisation and globalisation influence. For example, the international energy industry was created in the first half of 20th century and has seen rapid growth thereafter.[238] The international oil and gas industry remains one of the largest by revenues and foreign direct investment, even after a very sharp decline in 2014-2015.[239] Of course, with such high amounts at stake, as well as typically long project implementation time which leads to numerous risks which are hard to predict at the time of contract execution, these factors often result in substantial international disputes. Such disputes are usually referred to arbitration rather than litigation due to, *inter alia*, the strong international aspect involved in these relations.[240] Indeed, it was noted that such frequent recourse to arbitration has resulted in the enhancement of the international customary law aspect of energy law, which in turn has led to the emergence of *lex petrolea*, the *lex mercatoria* of the petroleum industry,[241] a reflection of the common law of the international petroleum industry.[242] In fact, even the term '*lex petrolea*' itself emerged from the landmark arbitration case of *the Government of the State of Kuwait v American Independent Oil Co (AMINOIL)*,[243] where it was argued that it constituted 'a particular branch of a general *lex mercatoria*' consisting of customary rules appropriate to the petroleum industry.[244] Despite such argument not being taken into consideration by the tribunal, it has eagerly been taken on board by academics ever since[245] and today the vast majority of commentators on *lex petrolea* agree that it equates to transnational petroleum law.[246]

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[238] Bishop (n 100) 17.

[239] See generally Thomas Childs, 'The Current State of International Oil and Gas Arbitration' (2018) 13 (1) Texas Journal of Oil, Gas and Energy Law 1, 3-4.

[240] Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 7.

[241] Thomas Walde and Alan Page, 'Editorial' (1993) 11 The Journal of Energy & Natural Resources Law 1, 4; Alex Wawryk, 'Petroleum Regulation in an International Context: the Universality of Petroleum Regulation and the Concept of *Lex Petrolea*' in Tina Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (Edward Elgar Publishing 2015) 6-7, 23; Carmen Garcıa-Castrillon, 'Reflections on the Law Applicable to International Oil Contracts' (2013) 6 (2) Journal of World Energy Law and Business 129, 134, 136, 140, 145; Sannan Tariq, 'The Potential Of *Lex Petrolea* – A Uniform Code Of Petroleum Laws' (*Courting the Law*, 9 November 2017) <http://courtingthelaw.com/2017/11/09/commentary/the-potential-of-lex-petrolea-a-uniform-code-of-petroleum-laws/> accessed 20 September 2019; Saidov (n 140) 25; Tabari (n 100) 38, 130. However, see also Alfredo De Jesús, 'The Prodigious Story of the *Lex petrolea* and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' (2012) 1 (1) Transnational Petroleum Law Institute Series on Transnational Petroleum Law 1, 11-19 where he argues that even though *lex mercatoria* and *lex petrolea* share a number of important similarities, *lex petrolea* is not a subset of *lex mercatoria* and stands on an equal footing, the key difference between them is that no one actually disputes the existence of *lex petrolea* (see the same fact is also expressed by Wawryk, but he does not put it forward in argument that *lex petrolea* is a distinct body from *lex mercatoria*). At the same time, significant criticism was expressed of *lex petrolea* and its concept as defined by De Jesus by Daintith in his article (see Terence Daintith, 'Against '*Lex Petrolea*'' (2017) 10 (1) The Journal of World Energy Law and Business 1). Nevertheless, Daintith does not disagree with the unique nature of the oil and gas industry and its specific legal regulation, he simply points out that the not fully formed concept of *lex petrolea* is not useful for further development of the industry regulation and should be abandoned in favour of a transnational petroleum law framework.

[242] Talus, Looper and Otillar (n 100) 189; Saidov (n 140) 14.

[243] Award dated 24 May 1982.

[244] See also Martin, '*Lex Petrolea* in linternational Law' (n 100) 95. However, it seems that it is not accidental that Professor El-Kosheri, the Kuwaiti counsel in that arbitration, referred to the concept of *lex petrolea*, because he is closely associated with the French school of legal thought of École de Dijon, a school which is largely responsible for the creation of the doctrine of the new *lex mercatoria* (see Daintith (n 241) 4; De Jesús (n 241)).

[245] See Bishop (n 100) 1; see also Wawryk (n 241) 20, 23.

[246] Tabari (n 100) 38-39, Wawryk (n 241) 6; Saidov (n 140) 3-4.

Many consider the launching of a comprehensive academic discussion of *lex petrolea* to be in 1997, when Bishop used the concept in his article titled 'International Arbitration of Petroleum Disputes: Development of a "*Lex petrolea*"'.[247] However, back then he concluded that arbitral awards involving petroleum issues were not numerous and *lex petrolea* had not yet created a mature set of legal regulations.[248] Nevertheless, nearly 15 years later Childs stated that the amount of published awards and the variety of issues they addressed was sufficient to create *lex petrolea*[249] (although Childs slightly modified his position in 2018 by stating that the rulings in the arbitration awards had created, or at least had begun to create, *lex petrolea*, but this *lex petrolea* did not comprise a set of legal rules which displaced host government contracts or the applicable law).[250]

Interestingly, while both of the above authors relied predominantly on investment arbitration awards, in the last decade academic thought has widened to include commercial arbitral awards and other sources in the energy sector,[251] such as the common norms and principles of domestic legal systems that have become 'internationalised'[252] and, more noticeably, model petroleum industry contracts.[253] Given the above arguments it is clear that the distinct feature of *lex petrolea*, according to its proponents, is that investment arbitration disputes, not commercial ones, constitute its major source. Oil and gas disputes are indeed one of the largest areas in investment arbitration.[254] However, compared to the amount of disputes referred to in commercial arbitration, the number of investment arbitral awards is marginal.[255]

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[247] Bishop (n 100).

[248] ibid 64. Many actually think that this article gave birth to *lex petrolea* (see Daintith (n 241) 3) See also Tariq (n 241); Saidov (n 140) 34.

[249] Childs, 'Update on *Lex Petrolea*' (n 100) 259; see also Martin, '*Lex Petrolea* in International Law' (n 100) 99. However, see Tabari (n 100) 39, in which it is argued that *lex petrolea* is "well on its way to become a mature subset of law operating alongside municipal laws and international investment law in the pluralistic framework of applicable law to foreign direct investment in oil and gas enterprises".

[250] Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 19.

[251] See ibid; Martin, '*Lex Petrolea* in International Law' (n 100) 95; Wawryk (n 241) 28, 33-34; Tabari (n 100) 39. Although such wide definition is criticised by Daintith, see Daintith (n 241) 6;

[252] Wawryk (n 241) 7; see also John Bowman, '*Lex Petrolea*: Sources and Successes of International Petroleum Law' (*King & Spalding*, 13 February 2015) <https://www.kslaw.com/blog-posts/lex-petrolea-sources-successes-international-petroleum-law> accessed 20 September 2019.

[253] Other sources, according to Martin, '*Lex Petrolea* in International Law' (n 100) 95, include business practices and, more debatably, court cases. See also Bowman (n 252). De Jesús (n 241) collectively names all these sources as 'best oilfield practices'.

[254] According to some sources, it amounts to approximately 15% of all investment disputes (see Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 6). However, according to the official ICSID Caseload data, Oil, Gas and Mining disputes constitute around 24% of all disputes and Electric Power and Other Energy have the share of 17%. See ICSID, 'The ICSID Caseload – Statistics' (2018) <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf> accessed 20 September 2019. See also David Isenegger, 'Dispute Resolution: an Industry Perspective' in Ronnie King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2012) 76.

[255] See Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 4-5. The number of investment arbitration awards with regards to oil and gas industry is just around 70 since 1972; Timothy Martin, 'Dispute Resolution in the International Energy Sector: an Overview' (2011) 4 (4) Journal of World Energy Law and Business 332. At the same time, the number of commercial arbitration disputes is very high in the leading arbitration centres. For example, according to the ICC, energy disputes were the second largest category in its 2018 caseload (after construction), see ICC Dispute Resolution 2018 Statistics, 13. Also, energy and resources disputes is the second largest category within the LCIA with 19% of all the 2018 caseload (although in 2017 it amounted to 24%), see LCIA, '2018 Annual Casework Report' (1 April 2019) <https://www.lcia.org/News/2018-annual-casework-report.aspx> accessed 20 September 2019. See also Maxi Scherer (ed), *International Arbitration in the Energy Sector* (OUP 2018) 3.

At the same time, international commercial arbitration awards are of little help in establishing *lex petrolea* because of a scarcity of such published awards, which considerably restricts the development of *lex petrolea*.[256] With regard to investment arbitration, even though there is no requirement to use precedents, the fact that nearly all investment disputes are publicly available, results in arbitrators making their awards in context rather than in a legal vacuum and refer to previous awards.[257] In fact, *the Government of the State of Kuwait v American Independent Oil Co (AMINOIL)*, which is perceived by many as the starting point for *lex petrolea*, has been cited in more than 40 investment arbitral awards, but, however, remains the only award that specifically uses the term *lex petrolea*.[258]

In contrast, the term *lex sportiva* and its variations is often referred to in arbitral awards.[259] *Lex sportiva*, the alleged branch in the sports industry, appeared relatively recently (approximately in the 1990s)[260] due to the increased commercialisation of sport[261] and its specific nature and role in today's world.[262] Consequently, in the late 1990s the term '*lex sportiva*' was introduced, but, as in the case with *lex mercatoria*, such term has achieved various definitions.[263] In addition, while the term '*lex sportiva*' seems to be universally accepted by the academic community, other terms are often used within the area, such as 'global sports law', 'transnational sports law', '*lex ludica*', 'public international sports law' and 'European sports law'.[264]

Writing in 2001 Davis distinguished three major views in regard to *lex sportiva*:[265] (a) the traditional view that there is no such law; (b) the moderate position that it has the capacity to develop into an independent area of law; and (c) the view that it is a separate area of law. He then proceeded with identifying eleven factors which may distinguish whether an independent

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[256] Martin, '*Lex Petrolea* in International Law' (n 100) 106; Talus, Looper and Otillar (n 100) 189; Wawryk (n 241) 34.
[257] Martin, '*Lex Petrolea* in International Law' (n 100) 96; Tariq (n 241).
[258] Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 19-20.
[259] There have been around 28 arbitral awards identified.
[260] Although a variety of opinions have been expressed as to who actually was first to introduce this term. Most researchers in this area agree it was Matthieu Reeb, Secretary General of the Court of Arbitration for Sport (CAS) in 1998. However, others suggest that it was Michael Stathopoulos, the President of the International Association of Sports Law (IASL) in 1997, or Judge Mohammed Bedjaoui in 1993. See Galantić (n 136) 54; Richard McLaren, 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes' (2001) 35 (2) Valparaiso University Law Review 379; Robert Siekmann, 'The Etymology of the Termini Technici *Lex sportiva* and *Lex ludica*: Where Do They Come From?' (2011) 3-4 The International Sports Law Journal 153.
[261] Kolev (n 101).
[262] On many occasions the European Court of Justice has recognised exceptions to regular law due to the specific nature of sports regulation. See, for example, Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namm-Braine ASBL v. Fédération royale belge des sociétés de basketball ASBL* (FRBSB) [2000] ECR I-02681; Robert Siekmann, *Introduction to International and European Sports Law* (T.M.C. Asser Press 2012) 5-6.
[263] See, for example, James Nafziger, 'Defining the Scope and Structure of International Sports Law: Four Conceptual Issues' (2011) 3-4 The International Sports Law Journal 14, 18, where Nafzinger tries to coalesce various definitions into one: "[...] an emerging body of law which transcends the rules of the game, the ethical norms of sport, and decisions in the field of play, otherwise known collectively as the *lex ludica*".
[264] For a more detailed description of these terms and their correlation with *lex sportiva* see Siekmann, *Introduction to International and European Sports Law* (n 262); Ken Foster, 'Is There a Global Sports Law?' in Robert Siekmann and Janwillem Soek (eds), *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press 2012); Galantić (n 136).
[265] Timothy Davis, 'What Is Sports Law?' (2001) 11 Marquette Sports Law Review 211, 211-219.

legal area exists.[266] While not concluding whether sports law has become a separate legal area, if we apply all these factors ten years later, according to Siekmann, the answer would be positive.[267]

The link and similarities between *lex mercatoria* and *lex sportiva* have been noted by many authors.[268] It is not only because of the usage of the Latin terms but also a representation of the forms of non-state and supranational regulation of certain social relations.[269] For example, Gardiner notes that both *lex mercatoria* and *lex sportiva* respect a degree of autonomy, acknowledge cultural specificities, are part of a pluralist and complex normative rule structure, and acknowledge the need for international emphasis in terms of legal regulation.[270] However, at the same time, several authors view *lex sportiva* as an independent autonomous legal order which exists independently not only from state but also from *lex mercatoria* itself,[271] and is more institutionalised.[272] In addition, some even claim that the concept of *lex mercatoria* is inappropriate to sport and should not be followed.[273]

Lex informatica is the newest of the branches discussed and is often referred to as the *lex mercatoria* of cyberspace.[274] Its appearance is due to the technological progress and increased use of the Internet and online services in daily life and business.[275] The *lex informatica* concept gets its support from the fact that cyberspace is one of the most (if not the most) fast growing and developing areas, which means that any attempts to regulate it at an international level or

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[266] ibid 217-218.

[267] Siekmann, *Introduction to International and European Sports Law* (n 262) 5, 7.

[268] See for example, Franck Latty, 'Transnational Sports Law' in Klaus Vieberg (ed), *Lex Sportiva* (Duncker & Humblot GmbH 2015) 117-120; Nafziger (n 263) 18; Lorenzo Casini, 'The Making of a *Lex Sportiva* by the Court of Arbitration for Sport' (2011) 3-4 The International Sports Law Journal 21; Alfonso Valero, 'In Search of a Working Notion of *Lex Sportiva*' (2014) 14 The International Sports Law Journal 3, 5; Galantić (n 136) 53-54; Matthew Mitten and Hayden Opie, 'Sports Law: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution (2010) 85 (2) Tulane Law Review 269, 289; James Nafziger, 'The Principle of Fairness in the *Lex sportiva* of CAS Awards and Beyond' (2010) 3-4 The International Sports Law Journal 3; Ken Foster, '*Lex Sportiva* Transnational Law in Action' (2010) 3-4 The International Sports Law Journal 11, 20; Foster, 'Is there a global sports law?' (n 264) 45-46; Nafziger, '*Lex sportiva*' (n 136); Siekmann, *Introduction to International and European Sports Law* (n 262) 12.

[269] Galantić (n 136) 54; Marcus Mazzucco, '*Lex Sportiva*: Sports Law As A Transnational Autonomous Legal Order' (PhD Thesis, University of Victoria 2010) 57.

[270] James Gardiner and others, *Sports Law* (3rd edn, Cavendish Publishing 2006) 93.

[271] Nafziger, 'Defining the Scope and Structure of International Sports Law' (n 263) 18; Casini (n 268) 24; Nafziger, 'The Principle of Fairness' (n 268); Foster, 'Is there a global sports law?' (n 264) 50: interestingly, here the author identifies that the main difference between *lex mercatoria* and *lex sportiva* is that the former is based on a contract, whereas the latter is based on a contract too, but a fictitious one if viewed through the lens of sociological analysis. However, this argument was effectively rebutted by Marcus F. Mazzucco in his doctoral work (see Mazzucco (n 269) 68-69) on the basis that positive law cannot emerge from invalid or non-existent sources of law.

[272] Latty (n 268) 9.

[273] Antoine Duval, '*Lex Sportiva*: A Playground for Transnational Law' (2013) 19 (6) European Law Journal 822, 827. See also Valero (n 268) 7: interestingly, it seems that Valero is a strong opponent of *lex mercatoria* as a concept, but a fierce proponent of *lex sportiva*.

[274] Mefford (n 103) 236; Reidenberg (n 103); Trotter Hardy, 'The Proper Legal Regime for "Cyberspace"' (1994) 55 University of Pittsburgh Law Review 993, 1019-1021; Patrikios (n 138) 274; Axel Metzger, 'Transnational Law for Transnational Communities The Emergence of a *Lex Mercatoria* (or *Lex Informatica*) for International Creative Communities' (2012) 3 Journal of Intellectual Property, Information Technology and E-Commerce Law 361; David Johnson and David Post, 'Law and Borders - the Rise of Law in Cyberspace' (1996) 48 Stanford Law Review 1367; Lauri Railas, *The Rise of the Lex Electronica and the International Sale of Goods* (Publication of the faculty of law, University of Helsinki 2004) 38, 108, 500.

[275] Mefford (n 103) 238; Patrikios (n 138) 277.

through the process of convergence of national laws cannot be fully responsive to the speed of developments in international e-business and therefore bear the risk of obsolescence.[276] In addition, the boundaryless nature of cyberspace makes it distinctly separable from any legal doctrines tied to territorial jurisdictions.[277]

It is commonly accepted that the above distinct features of cyberspace make it a fertile ground for the successful functioning of similar sources as in *lex mercatoria*.[278] In fact, the idea of self-regulation in the field is well embraced and supported by the majority of researchers on the subject.[279] However, Poullet asserts that the specific difference between *lex mercatoria* and *lex informatica* is that the former is mostly concerned with economic matters, whereas the latter also deals with culture, values and liberties and does not have the same level of homogeneity.[280] In fact, relevant academic literature is not uniform as to the subject matter and the limits of *lex informatica* with some arguing that its application is restricted to one or more areas, such as in online dispute resolution, e-commerce regulation, domain name registration, trademarks and copyright issues, or encompasses all of them.[281] Furthermore, some early authors have viewed *lex informatica* as a more technological rather than entirely legal concept, which can offer technological solutions for regulation in cyberspace instead of standard legal methods.[282] However, this research is not concerned with such theories due to their non-legal basis.

2.3.2. Unique principles, practices, customs and usages in the branches of new lex mercatoria

As discussed in section 1.1.1 of Chapter 1, the essence of medieval *lex mercatoria* was in its principles, customs and usages employed by the community of trades to regulate their activities. The modern law merchant, whilst being a more sophisticated regime, retains the same features: the practices of traders, which are often represented in specific principles, customs and usages, form the core of the modern *lex mercatoria*. Whilst there are certain well-recognised and long-established principles, customs and usages relevant to any field (for

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[276] Patrikios (n 138) 278.

[277] Johnson and Post (n 274); Oliver Kichenside, 'Law of Globalisation: "Here, There and Nowhere"' (2003) 10 UCL Jurisprudence Review 141, 142. Some even go as far as to state that cyberspace poses a threat to the sovereignty of states, see Noel Cox, 'The Regulation of Cyberspace and the Loss of National Sovereignty' (2002) 11(3) Information and Communications Technology Law 241, 253.

[278] Yves Poullet, 'How to Regulate Internet: New Paradigms for Internet Governance Self-Regulation: Value and Limits', in Claire Monville (ed) and others, *Variations sur le Droit de la Société de l'Information. Cahiers du Centre de Recherches Informatique et Droit* (Académia Bruylant 2002); Patrikios (n 138).

[279] Philip Weiser, 'Internet Governance, Standard Setting, and Self-Regulation' (2001) 28 Northern Kentucky Law Review 822; Poullet (n 278); Railas (n 274); Hardy (n 274). Although see the opposite view in Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999) and Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (Basic Books 2006).

[280] Poullet (n 278) 108.

[281] See, for example, Johnson and Post (n 274); Railas (n 274); Kananke Liyanage, 'The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines' (2012) 17 (2) Deakin Law Review 251.

[282] Reidenberg (n 103); Abbey Stemler, 'Regulation 2.0: The Marriage of New Governance and *Lex Informatica*' (2016) 19 Vanderbilt Journal of Entertainment & Technology Law 87; Emily Weitzenboeck, 'Hybrid Net: the Regulatory Framework of ICANN and the DNS' (2014) 22 (1) International Journal of Law and Information Technology 49, 64.

example, *pacta sunt servanda*, good faith, etc.),[283] due to the diversified nature of modern commercial activities, industry-specific practices have been developed in certain sectors of the economy. Thus, the availability of such practices is a necessary pre-requisite of any branch of modern *lex mercatoria*.

For example, ever since sea trade became a commercialised field with many merchants involved in it, maritime law was classified as a distinct legal system with its own specific principles and regulation of sale of ships, the hiring of vessels which is made through standards forms (charterparties), bailment and contract in order to rule the carriage of goods by sea, marine insurance, etc.[284] Indeed, general principles of *lex maritima* markedly influenced the drafting of modern maritime laws and international conventions.[285] Tetley mentions the attachment, maritime liens and general average as examples of the medieval *lex maritima* which survived through the centuries up until modern times,[286] while others add abandonment in shipowners' limitation of liability, proportionate fault in marine collisions, the awarding of prejudgment interest as an integral part of damages from the date of the casualty[287] and the doctrine of frustration.[288] In addition, Tetley continues, modern *lex maritima* exists in international bills of lading and charterparty forms and in universal terms and practices throughout the shipping world (such as the Uniform Rules for Sea Waybills 1990 and the Voyage Charterparty Laytime Interpretation Rules 1993)[289] and is often found in maritime arbitral awards[290] throughout the world which are to a large extent are based on international trade usages and customs and on general principles of law recognised and accepted by the international community of merchants.[291] With regard to the latter, Tetley notes the trend towards generation of a body of arbitral case law in maritime arbitration, which in many aspects resembles the way in which common law was originally formed.[292]

Within the *lex sportiva* domain, the Court of Arbitration for Sport not only applies general principles and concepts of law (such as freedom of and respect for contract, force majeure,

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[283] See, for example, Mustill (n 32) 110-112; Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 1038-1040.

[284] Vincenzo Battistella, 'Maritime Law Courts and Judiciary Creation of Law: Effects on Civil Law Courts' (The Judicial Creation of Law and Dialogue Between Judges, Universitat Autònoma de Barcelona, 6 July 2017) <https://ddd.uab.cat/pub/poncom/2017/179895/Vincenzo_Battistella_Maritime_Law_Courts_and_Judiciary_creation_of_Law..pdf> accessed 20 September 2019.

[285] Massimiliano Rimaboschi, 'The Reformulation of the General Principles of the Lex Maritime: an Alternative and Complementary Method of Unification of Maritime Law' (2016) 22 (5) Journal of International Maritime Law 393, 399.

[286] Tetley (n 102) 107; see also Potter (n 225) 146.

[287] Battistella (n 284).

[288] Kate Lewins, 'A View from the Crow's Nest: Maritime Arbitrations, Maritime Cases and the Common Law' (Australian Maritime and Transport Arbitration Commission, 42nd Annual Conference, 16 September 2015) <http://amtac.org.au/wp-content/uploads/2016/07/AMTAC-Address-2015.pdf> accessed 20 September 2019.

[289] Tetley (n 102) 133.

[290] And historically, arbitration, not litigation or other means of dispute resolution, is used for settlement of the majority of contractual shipping disputes, (see Bruce Harris, 'Maritime Arbitration in London' (2000) 66 (1) Arbitration 21).

[291] Tetley (n 102) 108, 145.

[292] ibid 138; see also Calliess and Klopp (n 98) 9.

good faith, protection of legitimate expectations, the *contra proferentem* principle, equal treatment and proportionality), but also creates specific principles applicable to sport. Most notably such principles include fair play, the strict liability principle in doping cases, unchallengeable match decisions and the existence of the "sporting nationality" concept as distinct from the legal definition of nationality.[293] In fact, the CAS has developed such an extensive number of sport-related principles that Foster suggested classifying them into certain specific groups, such as principles related to the rules of the game, principles related to ethical standards in sport, principles related to legal regulation of sport activities and procedural and harmonisation principles.[294]

Remarkably, if one is to look at various sport federations' charters and statutes,[295] the Olympic Movement Charter[296] and the World Anti-Doping Code (the WADA Code),[297] many principles of sport regulation have been codified. Such principles often relate to the commercial and economic side of sport.[298]

In contrast, *lex informatica*'s principles, customs and usages are generally not codified. Patrikios explains this by referring to high dynamics in cyberspace: the practices of *lex informatica* might be changing and being updated frequently.[299] Nevertheless, he mentions such unique principles operable within *lex informatica* as being the functional equivalence of documents and signatures and the principle of technological-medium neutrality.[300] In addition, Railas mentions that the general principle of admissibility of evidence in electronic form found in many jurisdictions actually stems from *lex informatica*.[301] As for the unique customs, Patrikios provides examples of the obligation of professional parties to use state-of-the-art security technology as a means of protecting the confidentiality and integrity of their transactions and a presumption of IT competence of those professional parties who engage in e-business and possess the necessary skills and equipment.[302] At the same time, the above suggested principles and customs look over-generalised and do not therefore have significant practical value. In fact, they are unlikely to be considered as representative of specialised principles, customs and usages in the industry.

However, it is worth mentioning that in justifying its existence, Patrikios and many other

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[293] Parrish (n 136) 719-720; Casini (n 268) 24; Foster, '*Lex sportiva* and *Lex ludica*' (n 101) 2.
[294] Foster, '*Lex sportiva* and *Lex ludica*' (n 136) 1-3.
[295] See, for example, Art 15 of FIFA Statutes (2019); Art 3 of the UCI Constitution (2018), etc.
[296] See the preamble of the Olympic Movement Charter (2019).
[297] See article 2.2 and 7.9 of the WADA Code.
[298] See, for example, the principle of solidarity and support for reinvestment as stated in Art. 2(h) of UEFA Statutes (2018) or the principle of proportionality of recovery of costs or financial sanctions on account of anti-doping rule violations as stated in Art. 10.10 of the WADA Code.
[299] Patrikios (n 138) 298; see also Mefford (n 103) 231.
[300] Patrikios (n 138) 297.
[301] Railas (n 274) 500.
[302] Patrikios (n 138) 298. Although he also points out that further research is required in order to identify more practices and usages.

supporters of *lex informatica* heavily rely on online dispute resolution.[303] Whilst online dispute resolution may take place in different forms, all authors include domain name dispute resolution under the UDRP as one of the primary examples of *lex informatica* in action. Notably, as will be shown in section 4.5.3 of Chapter 4, UDRP Panels have developed a number of unique principles relevant to domain name registration and holding via interpretation of the UDRP policy provisions.[304] Such unique principles include elaboration of circumstances and tests under which a party can rely on or invoke a certain provision of the UDRP policy (for example, in relation to confusing similarity between a trademark and a domain name, legitimate non-commercial or fair use of a domain name, usage in bad faith, etc).[305] Therefore, it seems that, at least for the moment, the available principles, customs and usages of *lex informatica* mostly relate to domain name regulation.

In contrast, the situation with *lex petrolea* is not straightforward. Most academic literature on the subject of *lex petrolea* operates on the notion that there are some specific principles and customs in the petroleum industry.[306] However, upon closer examination it is clear that the authors seldom provide any examples of such principles or name specific customs.[307] Even if any principles or customs are mentioned, they are of an essentially general legal nature and it is argued that the application of general principles of law to petroleum contracts constitutes the uniqueness of *lex petrolea*.[308] Moreover, arbitral awards cited in support of the application of petroleum principles often deal with general legal issues in the context of the petroleum industry, such as a breach of obligations under the contract[309] or nationalisation[310] (see more examples in section 4.6.2 of Chapter 4). Perhaps, the only relative unique practice in *lex petrolea* is the extensive use of stabilisation provisions in host government contracts.[311] Due to the fact that host government contracts are usually for a significant duration, stabilisation clauses are often included to freeze the provisions of respective national regulation at the time of the execution of the contract, thus aiming to ensure that the concessions would be operative

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[303] See, for example, Patrikios (n 138); Ujjwal Kacker and Taran Saluja, 'Online Arbitration for Resolving E- Commerce Disputes: Gateway to the Future' (2014) 3 (1) Indian Journal of Arbitration Law 31; Katsh (n 138).

[304] David Wotherspoon and Alex Cameron, 'Reducing Inconsistency in UDRP Cases' (2003) 2 Canadian Journal of Law and Technology 71, 72-73.

[305] See basic description of these principles in Torsten Bettinger and Allegra Waddell (eds), *Domain Name Law and Practice: An International Handbook* (2nd edn, OUP 2015).

[306] Talus, Looper and Otillar (n 100) 189-190; see generally De Jesús (n 241).

[307] See generally the appropriate criticism expressed in Daintith (n 241) 4 with regards to the works of Bishop, Childs, De Jesus and others.

[308] See examples in Bowman (n 252). Bowman rightfully questions this approach by asking whether such customs and practices arose in the international oil industry or in the international arbitration industry.

[309] *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 September 2009; *ICC Case No. 11663*, Award (2003); *Bettis Group Inc v Profco Resources Ltd*, AAA Case No 77-T-168-00228-98, Award dated 9 September 2000; *Joint Venture Yashlar v Government of Turkmenistan*, ICC Case No. 9151, Interim Award dated 8 June 1999; *Chevron Corporation v Republic of Ecuador*, PCA Case No 2007-2, Partial Award on the Merits dated 30 March 2010; *Frontera Resources Azerbaijan Corporation v State Oil Company of the Republic of Azerbaijan*, award dated 16 January 2006; *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures dated 31 July 2009.

[310] *Mobil Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated 10 June 2010.

[311] Bowman (n 252).

for the full term provided in the contract.[312]

Except for stabilisation clauses, the absence of unique industry practices within *lex petrolea* (both in the academic literature and dispute resolution practice) raises significant issues as to the very existence of this branch. This is striking in comparison with other branches which have a number of distinct industry-specific principles, customs and usages at their core.

2.3.3. The role of industry associations and support of their activities by states and international community

As mentioned in section 2.2.2 above, the establishment of authoritative industry associations representing the interests of the business community in a certain sector was one of the reasons for the re-emergence of the new *lex mercatoria*. Moreover, in the light of the co-existence of the law merchant and state law, such associations should enjoy the support of states and the international community for their activities. Remarkably, in many of the branches of the modern *lex mercatoria* there is such an association, which is chiefly responsible for the development of authoritative non-state regulation in the field.

The most illustrative example of the established efficient autonomous private regulation alongside state regulation is sport. The modern sports industry has a sufficient institutional organisation, which is transnational in nature and is structured pyramidically with the international sport federations for each sport (such as FIFA [the Fédération Internationale de Football Association] for football, FIBA [the International Basketball Federation] for basketball, IAAF [the International Association of Athletics Federations] for athletics)[313] and the International Olympic Committee (the IOC), the supreme authority within the Olympic Movement, at the top.[314]

The IOC is an international non-governmental not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person.[315] At the same time, it was duly noted that the status and mission of the IOC is quite unique and not typical for a non-governmental organisation: whilst being privately funded, it is a by-product of the state system with its affiliates being of both public and private, state and non-state origin, and claims authority over a broad movement that transcends traditional boundaries in a global society.[316]

The IOC adopted the Olympic Charter, which serves as a constitution of world sport and

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[312] Bishop (n 100).

[313] Many of those also have regional associations, *e.g.* UEFA in Europe for football.

[314] Siekmann, *Introduction to International and European Sports Law* (n 262) 16. The Olympic Movement is *per se* founded on the concept of autonomy and good governance of sport, see Ana Adi, 'Media Regulations and the Olympic Charter: a History of Visible Changes' (2013) Journal of Olympic History 48.

[315] Article 15(1) of the Olympic Charter.

[316] Travis Nelson and Patrick Cottrell, 'Sport Without Referees? The Power of the International Olympic Committee and the Social Politics of Accountability' (2016) 22 (2) European Journal of International Relations 437, 444; Muriel Finnigan, 'Olympic Singularity – The Rise of a New Breed of Actor in International Peace and Security?' (PhD Thesis, University of Glasgow 2017).

represents the compilation of fundamental principles, rules and bylaws that regulate the IOC, International Sports Federations, and the National Olympic Committees as well as individual sportsmen competing in the Olympic Games.[317] Furthermore, in addition to the principles and provisions that deal with the organisational structure of the Olympic Movement, the Olympic Charter has specific articles dedicated to specific sanctions, disciplinary procedures and dispute resolution in sport and the mandatory nature of the World Anti-Doping Code.

In addition to the IOC, international sporting federations also play a crucial role by creating their own legislation in the form of various regulations for each kind of sport.[318] However, the autonomy of such regulations is within certain limits: these regulations of international sport federations, as well as their practice and activities, must be in strict conformity with the Olympic Charter, including the adoption and implementation of the World Anti-Doping Code[319] and the Olympic Movement Code on the Prevention of Manipulation of Competitions (2015).[320]

Even though there are usually national member associations (committees, federations, etc.) established within the structure of international sport federations, such associations are accepted exclusively upon compliance with the existing and future statutes, regulations and decisions of the appropriate international sport federations. In fact, National Olympic Committees of the IOC are seen as the IOC's representatives in a country rather than being a country's representative to the IOC.[321]

Curiously, there is another notable example of self-governing private organisation within sport which is a direct result of state and non-state cooperation, namely the World Anti-Doping Agency (WADA). WADA is the international, independent organisation monitoring the global fight against doping in sport whose main responsibility is to be a custodian of the World Anti-Doping Code (WADA Code). WADA is considered by many as a clear example of a hybrid institution: while formally being a private law organisation, it performs several important functions relative to public authorities.[322] Within its structure it holds equal representation from the Olympic Movement and governments.[323] In fact, it may well be the first case worldwide that an association governed by private law (the IOC in this case) joins forces with governments in forming an organisation to combat a worldwide problem.[324]

WADA has developed and regularly updates six standards regarding the anti-doping regime

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[317] 'The Olympic Charter' (2016), 16 Insights on Law & Society 10.
[318] Foster, 'Is there a global sports law?' (n 264) 38.
[319] Currently in its 2019 version.
[320] Article 25 of the Olympic Charter.
[321] Mark James and Guy Osborn, 'The sources and interpretation of Olympic law' (2012) 12 (2) Legal Information Management 80, 82.
[322] Lorenzo Casini, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)' (2009) 6 International Organizations Law Review 421, 436.
[323] 'Governance' (*WADA*, [no date]) <https://www.wada-ama.org/en/governance> accessed 20 September 2019.
[324] Matthias Kamber, 'Development of the Role of National Anti-Doping Organisations in the Fight Against Doping: From Past to Future' (2011) 213 Forensic Science International 3, 5.

and periodically produces sets of recommendations and good practice.[325] However, there is little doubt that the WADA Code has been the most important development of the organisation. The WADA Code harmonises and standardises anti-doping policies, rules and regulations within sport organisations and among public authorities around the world.[326] It is notable that the adoption of the WADA Code and its universal acceptance has had a profound effect on the public sector which resulted in adoption of the UNESCO International Convention against Doping in Sport 2005 (which is one of the most successful conventions ever drafted with 187 state parties' ratifications/accessions in less than 15 years)[327] in order to align their domestic policies with the WADA Code.[328] Additionally, the Court of Arbitration for Sport has repeatedly recognised the key role of WADA and its Code in the harmonisation of the worldwide fight against doping.[329]

It is interesting that within the academic literature on the status, structure and unique position of the IOC and WADA the authors often make a comparison to another organisation within the *lex informatica* domain, namely the Internet Corporation for Assigned Names and Numbers (ICANN), an internationally organised, non-profit corporation.[330] The key common feature of these organisations is self-governance and the successful establishment of the global private regime. From the very beginning of the functioning of the Internet the apparent difficulty in its regulation has been noted.[331] Indeed, it is hard to regulate all the legal aspects that might arise in cyberspace, and ICANN was established to provide regulation in solely one area: to perform technical coordination and regulation of the domain name system in the Internet, in particular Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and the country code (ccTLD) Top-Level Domain name system management, and root server system management functions.

Early upon its creation it was noted that ICANN is capable of changing radically the functioning of the Internet and provide for its effective structured governance.[332] Although it may seem that

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[325] World Anti-Doping Agency, 'International Standards' (*WADA*, [no date]) < https://www.wada-ama.org/en/what-we-do/international-standards> accessed 20 September 2019; Casini, 'Global Hybrid Public-Private Bodies' (n 322) 433.

[326] World Anti-Doping Agency, 'The Code' (*WADA*, [no date]) <https://www.wada-ama.org/en/what-we-do/the-code> accessed 20 September 2019; Daniel Gandert, 'The WADA Code: Optimal on Paper' (2017) 32 Maryland Journal of International Law 274, 280. However, the author also expresses his criticism with regards to the lack of harmonisation and effectiveness of the application of the WADA Code. See additionally Verner Møller, 'The Road to Hell is Paved with Good Intentions—a Critical Evaluation of WADA's Anti-Doping Campaign' (2016) 4 Performance Enhancement & Health 111.

[327] Although Barrie Houlihan makes a valid point that despite the exceptional pace of ratification of the convention by the IOC, international sporting federations and governments, there is substantial evidence of a low level of commitment from a number of these actors due to a lack of political will (see Barrie Houlihan, 'Achieving Compliance in International Anti-Doping Policy: an Analysis of the 2009 World Anti-Doping Code' (2014) 17 Sport Management Review 265).

[328] 'Global Anti-Doping Organization Chart' (*WADA*, January 2009) <https://www.wada-ama.org/sites/default/files/resources/files/WADA_PK_Global_ADO_Chart_200901_EN.pdf> accessed 20 September 2019.

[329] WADA & Union Cycliste Internationale (UCI) / Valverde & Real Federacion Espaniola de Ciclismo (RFEC), CAS 2007/A/1396 & 1402, award dated 10 July 2008; Doping Authority Netherlands v. Mr Nick Zuijkerbuijk, CAS 2009/A/2012, award dated 11 June 2010.

[330] See, for example, Nelson and Cottrell (n 316) 453; Casini, 'Global Hybrid Public-Private Bodies' (n 322) 438.

[331] Hans Klein, 'ICANN and Internet Governance: Leveraging Technical Coordination to Realize Global Public Policy' (2002) 18 (3) The Information Society 193, 194; Auby (n 167) 33.

[332] Klein (n 331) 193-194.

regulation of domain names is only one aspect of the Internet functioning, it is arguably the most important aspect:[333] centralisation and regulation of such an essential resource as a domain name within cyberspace provides substantial controlling and administrative powers, including banishment from the Internet in the event of denial of access to a domain name.[334]

Following its establishment, ICANN had been under the oversight of the US Department of Commerce, which resulted in substantial criticism regarding the autonomy and independence of the organisation from academics and governments which perceived the alleged global USA monopoly over domain names allocation as highly undesirable.[335] Nevertheless, the ultimate goal of ICANN had always been to free itself from any possible external influence and, through a series of arrangements with the Department of Commerce,[336] such goal was ultimately achieved in October 2016 when the control over the organisation passed completely to the global Internet community. In the words of the ICANN Board Chair: "This community validated the multi-stakeholder model of Internet governance. It has shown that a governance model defined by the inclusion of all voices, including business, academics, technical experts, civil society, governments and many others is the best way to assure that the Internet of tomorrow remains as free, open and accessible as the Internet of today".[337] Thus, following the termination of oversight by the US Department of Commerce ICANN the USA is on a par basis with other governments represented at the ICANN's Governmental Advisory Committee, which comprises 176 members and 36 observers.[338]

Indeed, ICANN is a private organisation, but its functions are of public law origin; the organisational structure of ICANN includes state and non-state actors; and its role is of international significance as it manages unique resources of global importance.[339] As in the case of the IOC and WADA, the ICANN represents an effort to establish an institution of a hybrid nature which results in the subsequent creation of a hybrid regime under which self-regulation and state regulation intertwine and complement each other in order to achieve greater efficiency.[340]

Within the maritime industry there is a plethora of associations, which produce regulatory instruments of regulation for certain aspects of sea trade business, such as in regard to bulk

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[333] Laura DeNardis, *Protocol Politics: The Globalization of Internet Governance* (MIT Press 2009) 14.

[334] More on the specifics of domain names can be found in Klein (n 331) 195-201. See also Michael Froomkin, 'Almost Free: an Analysis of ICANN's 'Affirmation of Commitments' (2011) 9 Journal on Telecommunications & High Technology Law 187, 210-219 where he discusses economic, political and, to some extent, strategic benefits of exercising control over domain names.

[335] Zhixiong Huang and Kubo Mačák, 'Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches' (2017) 16 (2) Chinese Journal of International Law 271, 291.

[336] Froomkin (n 334).

[337] ICANN, 'Stewardship of IANA Functions Transitions to Global Internet Community as Contract with U.S. Government Ends' (*ICANN*, 1 October 2016) <https://www.icann.org/news/announcement-2016-10-01-en> accessed 20 September 2019.

[338] About the GAC' (*ICANN|GAC*, [no date]) <https://gac.icann.org/about/members> accessed 20 September 2019.

[339] Weitzenboeck (n 282) 68-71.

[340] ibid 73.

dry cargo (International Association of Dry Cargo Shipowners), liner shipping (World Shipping Council), tankers (International Association of Independent Tanker Owners) and the cruise industry (Cruise Lines International Association).[341] Furthermore, the global shipping industry has also benefited through a specialised agency of the United Nations, the International Maritime Organisation (the IMO). Whilst the IMO's main role is to create a universal regulatory framework for the shipping industry in the areas of safety, energy efficiency, security and environment, it ultimately influences many aspects of the industry, including ship design, construction, equipment, manning, operation and disposal.[342] However, the functions performed by the IMO are of a public nature and do not directly affect or influence commercial practices, but rather set certain benchmark or limits for commercial parties to comply with and/or take into consideration.[343] Moreover, a significant drawback of the IMO is that its representation comprises member states alone.[344] Industry representatives can only obtain a consultative status.[345]

Nevertheless, there are at least two maritime associations which exercise a significant influence on the sector by producing regulations concerning a variety of aspects of maritime regulation on a global scale. Noticeably, both of these associations are consultative members of the IMO.

Firstly, the Baltic and International Maritime Council (BIMCO), set up by several European shipowners in 1905, has gradually grown into the world's largest international shipping association with over 1,900 members globally.[346] Although states are not represented in BIMCO, the organisation maintains a close dialogue with governments and diplomatic representatives, including through being a consultative member of the IMO.[347] It is interesting

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[341] For more general information on these bodies see Proshanto Mukherjee and Mark Brownrigg, *Farthing on International Shipping* (4th edn, Springer 2013); see also Malcolm Latarche, 'Who are the main shipping organisations and what do they do?' (*ShipInsight*, 09 January 2018) <https://shipinsight.com/articles/main-shipping-organisations> accessed 20 September 2019.

[342] IMO, 'Introduction to IMO' (*IMO*, [no date]) <http://www.imo.org/en/About/Pages/Default.aspx> accessed 20 September 2019; see also Article 1 of the Convention on the International Maritime Organization 1948

[343] See, for example, Kitack Lim, 'The Role of the International Maritime Organization in Preventing the Pollution of the World's Oceans from Ships and Shipping' (2017) LIV (1-2) UN Chronicle; George Reynolds, 'The Regulation of International Shipping: Systematic Issues Facing States in the Administration of Maritime Affairs and the Eradication of Substandard Shipping' (Master Dissertation, World Maritime University 2000) 84; Gregory Silber and others, 'The Role of the International Maritime Organization in Reducing Vessel Threat to Whales: Process, Options, Action and Effectiveness' (2012) 36 Marine Policy 1221; Agustin Blanco-Bazán, 'The Role of the International Maritime Organization (IMO) in the Management of Maritime Risks' (1992) 17 (2) Geneva Papers on Risk & Insurance 244; Neil Bellefontaine and Tafsir Johansson, 'The Role of the International Maritime Organization in the Prevention of Illegal Oil Pollution from Ships: North Sea Special Status Area' in Angela Carpenter (ed), *Oil Pollution in the North Sea (The Handbook of Environmental Chemistry)* (Springer 2016) 49-66.

[344] See, for example, the criticism of this in InfluenceMap, 'Corporate Capture of the International Maritime Organization: How the Shipping Sector Lobbies to Stay Out of the Paris Agreement' (October 2017), 9-10.

[345] Albeit, the number of industry associations which have obtained such a status is impressive, see IMO, 'Non-Governmental International Organizations Which Have Been Granted Consultative Status with IMO' (*IMO*, [no date]) <http://www.imo.org/en/About/Membership/Pages/NGOsInConsultativeStatus.aspx> accessed 20 September 2019.

[346] 'About Us' (*BIMCO*, [no date]) <https://www.bimco.org/about-us-and-our-members/about-us> accessed 20 September 2019.

[347] Mukherjee and Brownrigg (n 341) 28. In fact, BIMCO states that it "was the first organisation to see the *benefit in joining forces with other countries* to secure better deals and standard agreements in shipping", see BIMCO (n 346).

that BIMCO claims support for the IMO as the main regulator for shipping, but at the same time opposes inconsistency and uncertainty in the application of international shipping rules created by certain national and regional initiatives.[348]

A key feature of BIMCO's current catalogue of standard forms of contract is its great diversity.[349] Initially starting with drawing standard form charterparty contracts, BIMCO has progressively moved to a policy whereby it develops one document for each niche of shipping and thus covers a variety of aspects of shipping.[350] At the time of writing, the BIMCO database contains around 200 standard contract forms and 130 standard clauses to complement the contracts,[351] which are regularly updated in line with current industry practice and legal regulation changes.[352] As summarised by Grant, BIMCO's standard clauses and contracts are "written for the industry by those in the industry with appropriate knowledge and expertise who share the firm belief in the benefits that a standard form of contract brings to the industry".[353]

BIMCO is the dominant provider of standard form contracts[354] and, since a specific feature of the maritime industry is that standard form contracts are used for nearly all maritime transactions,[355] BIMCO's role is very influential for the sector.[356] This is also confirmed by the fact that BIMCO issues its own positions regarding certain aspects of maritime regulation and usually addresses them to the IMO, including by criticising and showing flaws in the IMO's regulation, data and research.[357]

Secondly, the International Chamber of Shipping (the ICS), which consists of the national shipowners' associations whose membership comprises shipping companies that control over

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[348] Rasmus Jorgensen, 'Keep Shipping Regulation Global' (*BIMCO*, 24 November 2017) <https://www.bimco.org/about-us-and-our-members/bimco-statements/01-keep-regulation-global> accessed 20 September 2019.

[349] Grant Hunter, 'BIMCO Contracts and Clauses: Uniformity, Diversity and the Ethical Dimension' (2017) 23 (6) Journal of International Maritime Law 402, 403.

[350] ibid; Filippo Lorenzon, 'Harmonization of European Contract Law: Friend or Foe to the Shipping Industry?' (2004) 10 (6) Journal of International Maritime Law 504, 513. Such standard forms are widely recommended by practitioners for use, see, for example, Janice Clarke, 'Maritime Law Sources' (2008) 8 Legal Information Management 166, 170.

[351] 'Contracts and Clauses' (*BIMCO*, [no date]) <https://www.bimco.org/contracts-and-clauses> accessed 20 September 2019.

[352] Hunter (n 349).

[353] ibid 404.

[354] Calliess and Klopp (n 98) 8. Although in certain areas other standard contracts are more popular, mainly due to their longer use in the industry, such as, for example, the Lloyd's Standard Form of Salvage Agreement, which originates from the late 1800s, see Lloyd's, 'Lloyd's Open Form (LOF)' (Lloyd's, [no date]) <https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch/lloyds-open-form-lof> accessed 20 September 2019.

[355] Calliess and Klopp (n 98) 8; Carbonneau (n 186) 252 at note 174.

[356] In fact, certain authors go as far as to suggest that due to extensive consultations taken among the various parties to standard charterparties within BIMCO, its standard form contracts and clauses should be superior to any general conditions of contract, see Maurer (n 102) 100–101 as cited in Eric Van Hooydonk, 'Towards a Worldwide Restatement of the General Principles of Maritime Law' (2014) 20 (3) Journal of International Maritime Law 170, 175.

[357] See, for example Rasmus Jorgensen, 'Air Pollution Due To Sulphur' (*BIMCO*, 24 November 2017) <https://www.bimco.org/about-us-and-our-members/bimco-statements/03-air-pollution> accessed 20 September 2019; Rasmus Jorgensen, 'Greenhouse Gases (GHG) Emissions' (*BIMCO*, 24 November 2017) <https://www.bimco.org/about-us-and-our-members/bimco-statements/04-greenhouse-gases-ghg-emissions> accessed 20 September 2019; 'BIMCO All for Cutting Red Tape in Shipping' (*World Maritime News*, 28 November 2014) <https://worldmaritimenews.com/archives/144891/bimco-all-for-cutting-red-tape-in-shipping/> accessed 20 September 2019, etc.

80% of the world's merchant tonnage.[358] It is considered as the principal international trade association for the shipping industry, representing shipowners and operators in all sectors and trades, and was the first shipping industry association to be granted consultative status in the IMO in 1961.[359] The ICS often releases publications on best practice and regulatory compliance as an essential complement to international regulations, including those issued by the IMO.[360]

In the context of *lex maritima* promulgation, it is also worth mentioning the Comite Maritime International (CMI), a private non-governmental organisation focusing on the unification of maritime customs, usages and practices.[361] From the time of its inception the CMI has developed a number of universally recognised maritime conventions and is considered to be an influential body in the sector, but following the establishment of the United Nations and the IMO lost this status and concentrated on the development of soft law instruments.[362] Among the core aims of the CMI nowadays is the development of customary law based on standardised practices in the maritime industry, which are the backbone of international maritime law in its daily application.[363] In fact, the CMI is involved in a variety of projects in connection with the regulation of international maritime matters, one of which is specifically addressing the development of modern *lex maritima*.[364] The CMI has also developed several uniform instruments for regulation of maritime matters (most prominently the Uniform Rules for Sea Waybills 1990 and the Rules on Electronic Bills of Lading 1990).

Like the maritime industry, there is also a variety of private associations functioning in the petroleum industry. Such associations have largely concentrated on the development of a model or standard form contracts.[365] However, in contrast to the maritime industry, where despite a number of private associations each of them covers a specific aspect of shipping on a global scale, petroleum associations often represent geographical regions (see, for example, the United Kingdom Petroleum Industry Association, the Dutch Petroleum Industry Association, the Canadian Association of Petroleum Landmen, the American Association of

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[358] ICS, 'The International Chamber of Shipping (ICS): Representing the Global Shipping Industry' (*ICS*, 2007) <https://www.ics-shipping.org/docs/default-source/about-ics/the-international-chamber-of-shipping-ics-representing-the-global-shipping-industry.pdf?sfvrsn=18> accessed 20 September 2019.

[359] ibid.

[360] See, for example, Bridge Procedures Guide (2016), Guidelines on the Application of the IMO International Safety Management (ISM) Code (2010), Tanker Safety Guides (2018), etc; ICS (n 358); Latarche (n 341).

[361] Frank Wiswall, 'Comite Maritime International: A Brief History' (*CMI*, January 2012) <https://comitemaritime.org/wp-content/uploads/2018/06/a-brief-history-wiswall.pdf> accessed 20 September 2019. See also Paulsen (n 225) 1084. See generally Francesco Berlingieri, 'The Work of the Comite Maritime International: Past, Present, and Future' (1983) 57 Tulane Law Review 1260.

[362] See Berlingieri (n 361) 1264.

[363] Wiswall (n 361).

[364] See 'Restatement of the *Lex Maritima*' (*CMI*, [no date]) <https://comitemaritime.org/work/lex-maritima/> accessed 20 September 2019.

[365] As reported by many authors, such model contracts have been used widely within the petroleum industry due to their substantial benefits, such as, *inter alia*, increased speed of negotiating and drafting of petroleum contracts, reduction of transaction costs by saving relevant drafting time, a continuous improvement in the quality of contracts, etc. See Saidov (n 140) 13; see also Talus, Looper and Otillar (n 100) 184; Wawryk (n 241) 14.

Petroleum Landmen, the United Kingdom Offshore Operators Association, the Canadian Association of Oilwell Drilling Contractors, etc.).[366] Moreover, model contracts developed by these associations frequently have subject matters that overlap.[367] This does not promote uniformity in the area and results in the development of differentiating practices over similar aspects. For instance, in his study Martin gives examples of 18 types of model contracts commonly used in the international petroleum industry covering a number of important issues.[368] At the same time, in an updated version of the same study Martin and Park specify 20 petroleum industry associations and organisations which in total have produced over 200 model contracts and forms.[369]

Interestingly, proposals of standardising and unifying the petroleum industry are not limited solely to private associations, but also take place at intergovernmental level, albeit with no obvious success. In this regard, the Organization of the Petroleum Exporting Countries (OPEC) is probably the most influential petroleum intergovernmental organisation in the world, whose mission is "to coordinate and unify the petroleum policies of its Member Countries and ensure the stabilisation of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return on capital for those investing in the petroleum industry".[370] OPEC members collectively supply about 44% of the world's crude oil production and control about 81.5% of the world's total proven crude reserves,[371] thus exercising a significant influence on the regulation of the petroleum industry, but, nevertheless, not at a global level.

Notably, at the end of 1963, the Fifth OPEC Conference resolved to invite several experts from OPEC member states and other countries to work on the compilation of a Code of Uniform Petroleum Laws, but nothing materialised from this initiative.[372] Today there are suggestions to modernise OPEC by including specific provisions in the organisation's governance and policy provisions to support *lex petrolea* as the governing regime for international petroleum transactions and disputes arising therefrom.[373] However, currently such suggestions have not gained any significant support.

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[366] See more examples in Martin and Park, 'Global Petroleum Industry Model Contracts Revisited' (n 187).

[367] See, for example, the variety of model joint operating agreements issued by several associations, such as the American Association of Professional Landmen, the Association of International Petroleum Negotiators, the Australian Mining Petroleum Law Association, the Canadian Association of Petroleum Landmen, the Oil and Gas UK, the Norwegian Petroleum Directorate, etc. See more details in Peter Roberts, *Petroleum Contracts: English Law and Practice* (2nd edn, OUP 2016) 50-58.

[368] Martin, 'Model Contracts' (n 188).

[369] Some of which cover highly technical matters, see Martin and Park, 'Global Petroleum Industry Model Contracts Revisited' (n 187).

[370] See OPEC Statute (1961).

[371] 'OPEC Fast Facts' (*CNN Library*, 10 April 2019) <https://edition.cnn.com/2013/07/30/world/opec-fast-facts/index.html> accessed 20 September 2019.

[372] Bowman (n 252).

[373] Luis Cuervo, 'OPEC from Myth to Reality' (2008) 30 (2) Houston Journal of International Law 433, 532, 536.

2.4. General criteria

Summarising the above, globalisation and significant technical advances following World War II have contributed not only to the re-emergence of *lex mercatoria* theory, but to its fragmentation into certain branches. This fragmentation is largely attributed to the variety of available commercial activities as compared to the commercial setting of the Middle Ages. This has resulted in the appearance of new powerful actors, namely private industry associations representing interests of a particular business community in a certain sector of the modern economy on a global basis. Such private industry associations, combined with specialised dispute resolution centres, are the main factors contributing to the separation of the modern *lex mercatoria* into certain branches.

Of course, it is insufficient merely to claim the existence of a specific branch of the new *lex mercatoria* purely because of the establishment of a certain private association in a particular industry, which to some extent is engaged in the norm-making activity or codification of the existing principles, customs and/or usages relevant to the field. Such claim would be counterproductive and may result in some misleading or inappropriate conclusions.[374] Therefore, there is clearly a need to identify certain robust criteria in order for an alleged subset of *lex mercatoria* to qualify as its branch.

Thus, in this study some such non-exhaustive criteria were elaborated on the basis of identified similarities among several branches of *lex mercatoria*, which have received significant attention in thematic academic literature. Even though some further comprehensive research inquiries may reveal more aspects required for recognition of a separate branch of the modern law merchant,[375] the criteria identified above should be viewed as key or essential to the recognition of a separate branch of modern *lex mercatoria*. If one of the listed criteria is not satisfied, a branch of the law merchant will not be able to be constructively applied, further developed and provide for efficient and coherent norms, hence precluding its recognition as a

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[374] Such as the existence of *lex magica* in the community of magicians, see Julia Guilhelm, 'Lex Magica: A *Lex Mercatoria* Reflection' (2014) 37 Thomas Jefferson Law Review 125. See also examples of the diamond industry and tuna market in Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 The Journal of Legal Studies 115 and Eric Feldman, 'The Tuna Court: Law and Norms in the World's Premier Fish Market' (2006) 94 California Law Review 313 respectively. Whilst none of the abovementioned authors have explicitly expressed the view of the existence of a separate transnational legal regime for these industries and have instead explored them in order to show examples of successful functioning of closed private regimes wherein participants do not rely on state enforcement powers, any attempts to conclude for a separate branch of the modern *lex mercatoria* on the basis of the findings of Bernstein and Feldman should be rejected.

[375] See, for example, eleven factors identified by Davis regarding the existence of lex sportiva as an independent legal area in Davis (n 265) 217-218. In fact, some of the factors listed by Davis can be considered as similar or close to the criteria identified in this study, e.g. factual peculiarities within a specific context that produce problems requiring specialised analysis, unique approach of the application of law in a specific context by courts, which is often in conflict with other legal areas, the development of interventionist legislation to regulate specific relationships, discipline's significant effect on world's business and society, etc.

functional legal regime.

In particular, given the variety of modern economic activities, it is reasonable to suggest that *lex mercatoria* as a single body of law is not capable of being efficient in the regulation of all of them. Reverting to the example of the trade finance and maritime industries mentioned in section 1.1.2 of Chapter 1, customs and usages in these respective industries are significantly different and those practised in the maritime industry do not have any relevance to the area of trade finance (or, in fact, any other areas). Yet, customs and usages in both of these fields can be representative of the modern *lex mercatoria*. Moreover, even the importance of certain sources may differ depending on the particular industry (see the example of model contracts in the maritime industry and uniform rules in trade finance). Therefore, one of the criteria for a branch of *lex mercatoria* must be the availability of distinct industry-specific principles, practices, customs and/or usages. These principles, practices, customs and/or usages need to be unique to the particular field, widely recognised and practised by the relevant community of traders (even sometimes without the recognition of states) and transcend national borders.

The second criterion should be the availability of a leading private industry association which can act in the interests of the relevant community and be their representative voice. The re-emergence of *lex mercatoria* in the 20th century is closely connected to the appearance and establishment of powerful private business associations in certain areas of the modern economy. These associations exercise significant influence in their respective sectors by issuing certain regulations (such as standard form contracts, uniform rules for particular aspects) based on the observed practices in the field and incorporating industry-specific principles, customs and usages.

The third criterion is firmly connected to the previous one and relates to the support of states and international community of the activities, most notably applicable norm-making activities, of such leading private industry associations. Since the modern *lex mercatoria* exists in a very different setting from its medieval predecessor, any regulations issued by private industry associations cannot be detached from the state and require its approval. However, this does not necessarily mean that *lex mercatoria* is subordinate and exists only upon authorisation of the state. In fact, both have been engaged in a symbiotic relationship with the aim of the provision of a more efficient regulation.

The fourth criterion, and arguably the most important, is the availability of an industry-specific conflict resolution authority. Dispute resolution is firmly associated with *lex mercatoria* and is of significant importance to the theory. The second half of the 20th century has seen the rise of alternative dispute resolution, which has become the dominant option for cross-border disputes. However, as noted by many commentators, some features of alternative dispute resolution (most notably its confidential nature and the absence of *stare decisis*) have

precluded the steady and coherent development of *lex mercatoria*. Nonetheless, in the last couple of decades a number of specialised industry-specific dispute resolution centres have emerged which have features distinct from what is traditionally perceived to be the essence of private conflict resolution. In particular, as will be shown in Chapters 4 and 5, within these forums, disputes are resolved via extensive application of industry-related principles, customs and usages and dispute outcomes are published and accessible to the wider public. In turn, this results in reference to past rendered cases being made both by the parties and decision makers and, consequently, new norms are being developed through dispute resolution. As argued in this thesis, dispute resolution in the branches of *lex mercatoria* is of a crucial importance for ensuring practical relevance and liveliness of the theory. Therefore, a substantial portion of this research is focused on the analysis of dispute resolution (see Chapters 4 and 5).

2.5. Conclusions

This chapter has addressed the theoretical development of the fragmentation of the modern *lex mercatoria* into several distinct branches. Its purpose has been to identify similarities among the alleged branches of *lex mercatoria* as discussed in academic literature.

In order to fulfil this task, the chapter began with the discussion of the general reasons of the re-emergence of the theory of the law merchant in the second half of the 20th century. Such factors as globalisation and technical progress, which have ensured significant growth in international trade and the appearance of a variety of commercial activities, the rise of industry-specific dispute resolution, the rise of the authority of private industry associations and support of their norm-making activities by states and international community have been identified. The closer analysis of the last factor has resulted in an important finding of the co-existence of *lex mercatoria* (and its branches) with state law for the purposes of the effective regulation of commercial activities. Contrary to most literature on the subject of law merchant (both written by the proponents and opponents of the concept) which often compares *lex mercatoria* with state law by signposting its benefits or inadequacies, it has been shown in this chapter that the modern law merchant and state law have a symbiotic relationship: they do not compete, but complement each other. This is best evidenced through the functioning of various private industry associations, which have significant authority within (and sometimes beyond) their respective market niches, and have developed a substantial number of legal norms alongside the state.

The reasons for the revival of the theory have then been analysed in the light of the respective body of academic literature that argues for the existence of a separate branch of *lex mercatoria* in a specific area: *lex maritima* in the maritime industry, *lex sportiva* in sport, *lex petrolea* in the petroleum industry and *lex informatica* in the Internet. The results of such analysis has enabled

me to define certain similarities among the above branches (with the exception of *lex petrolea*, whose theoretical basis seems to be somewhat weak). Thus, I have elaborated non-exhaustive criteria for a branch of *lex mercatoria* to be recognised. These criteria include:

a) the availability of industry-specific principles, customs and usages relevant to a particular area;

b) the presence of a leading private industry association, which develops (codifies) and promotes such industry-specific principles, customs and usages;

c) the support of states and the international community for the activities of such private industry association; and

d) the availability of a leading industry-specific dispute resolution authority in the relevant area.

In the next chapter I will apply criteria a)-c) to the area of trade finance in order to establish whether there are sound grounds to suggest the existence of another separate branch of *lex mercatoria*, namely *lex documentaria commercium*. Due to the significance of dispute resolution to the theory of *lex mercatoria*, the criterion dealing with the availability of a leading industry-specific dispute resolution authority should be regarded as the most important criterion among those listed above and therefore needs to be analysed in more detail. Therefore, Chapter 4 of this thesis will deal with specific features of industry-specialised dispute resolution in the branches of *lex mercatoria*, whereas Chapter 5 will explore these features in conflict resolution in trade finance.

CHAPTER 3. THE CASE FOR *LEX DOCUMENTARIA COMMERCIUM* AS A BRANCH OF THE NEW *LEX MERCATORIA* IN THE AREA OF TRADE FINANCE

3.1. Introduction

The previous chapter was dedicated to the analysis of the fragmentation of the new *lex mercatoria* into several distinct branches in certain areas of the economy. As was shown, there is a wealth of academic literature arguing for the existence of a separate branch of the modern law merchant in areas such as the maritime industry (*lex maritima*), sport (*lex sportiva*), internet regulation (*lex informatica*) and oil and gas (*lex petrolea*). Following the analysis of similarities among these branches, I elaborated certain non-exhaustive criteria for a branch of *lex mercatoria* to be recognised. These criteria include a) the availability of industry-specific principles, customs and usages relevant to a particular area; b) the presence of a leading private industry association, which develops (codifies) and promotes such industry-specific principles, customs and usages; c) the support of states and the international community for the activities of such private industry association; and d) the availability of a leading industry-specific dispute resolution authority in the relevant area.

In this chapter I will apply most of the criteria identified in section 2.4 of Chapter 2 (except for the availability of a leading industry-specific dispute resolution authority, which will be dealt with separately in Chapters 4 and 5) to the area of trade finance and specifically to the field of documentary instruments. This is done for the purposes of exploration of the potential for the existence of a separate branch of *lex mercatoria*. For the sake of convenience and consistency of terminology, such proposed branch is named as *lex documentaria commercium*, which is in line with Latin denominations used in other branches of *lex mercatoria* and roughly translates as "the law of commercial documents".

With its rich history of self-regulation, it is no coincidence that the area of trade finance was chosen for the purposes of this study. As was discussed in section 1.1.3. of Chapter 1, in an attempt to accommodate various economic interests,[376] merchants developed several innovative methods of payment, including, but not limited to, letters of credit, bills of exchange, promissory notes, etc.[377] In essence, the law followed the practices of merchants[378] in this area and the first legal regulations were developed only in the mid-19th century.[379] Therefore, for a considerable period, merchants' practices, customs and usages, *i.e. lex mercatoria*, was the only source of regulation. Moreover, even following the absorption of the law merchant by common law and national codifications in civil law countries key principles governing the use of documentary instruments have largely remained untouched. Thus, the field of trade finance,

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[376] Davidson (n 38) 140; see also Kozolchyk (n 38) 395-400; see also Thayer (n 38) 1031-1033.

[377] Trimble (n 20) 981; Wunnicke (n 39); Davidson (n 38) 128; see also Holdsworth (n 39); Simapungula (n 39) 16-20; Manganaro (n 39) 275; see also multiple references in Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (n 39) 57-58. Here Dalhuisen also emphasises the importance of the new *lex mercatoria* for the development of modern financial and negotiable products.

[378] Davidson (n 38) 140; Kelly-Louw (n 40).

[379] Simapungula (n 39) 18; Ward and Harfield (n 41) 146-150.

and especially documentary instruments, represents a very promising and fertile area for promulgation of the case of the modern *lex mercatoria* and its successful functioning. In fact, Dalhuisen, one of the most ardent proponents of the new *lex mercatoria*, argues that the evolution of modern commercial law is now predominantly finance than trade or mercantile driven.[380] Therefore, within the context of evolutionary development of *lex mercatoria* through its branches, the respective branch of the law merchant in the area of trade finance, *lex documentaria commercium*, is of crucial importance because it represents a mix of financial, trade and mercantile aspects.

This chapter will also highlight the problems that arise when attempting to subject documentary instruments, which have long benefited from successful self-regulatory functioning, to a specific national law regime.[381] This is mainly due to the inability of the law to respond promptly to the developments in trade finance (here it is worth reverting to the discussion in section 1.1.3. of Chapter 1 about the static nature of law as opposed to the fast-moving field of trade and the consequent development of certain practices and usages). Moreover, often national laws contain conflicting provisions as well as being unsuited to trade finance practices, which significantly precludes uniformity in the area. This highly regrettable situation has long been noted by academics along with the need to eliminate inconsistencies in regulation by elaboration of an effective regime for documentary instruments' functioning. As illustratively noted by Kozolchyk in 1961:

> "The internationally widespread use of the instrument [a letter of credit] has in our day brought about conflicting rules in different jurisdictions; hence the need for uniformity. In the years that lie ahead, much of the legal effort will have to be directed to working out solutions for the conflicts created by the opposing rules arising from two or more countries, and by the inconsistencies between municipal statutory or case law and international banking customs."[382]

The abovementioned problems have become most visible in dispute resolution. As will be demonstrated below, the apparent challenges faced by judges in determining the governing law of a documentary instrument combined with their common inability to understand correctly the peculiarities of the structure and functioning of a particular documentary instrument often results in a greater degree of uncertainty for market practitioners. Such a situation is highly regrettable and undesirable, especially given the importance of documentary instruments that lead to the promotion and development of international trade. In particular, documentary instruments have been able to survive the test of time and have embraced new technological developments.[383] In fact, according to the most recent statistics, they are used in support of

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[380] See Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (n 39) 1.

[381] Trimble (n 20) 994; see also Dolan (n 57) vii-viii.

[382] Kozolchyk (n 38) 420.

[383] Represented by, *inter alia*, inclusion of relevant provisions on digitalisation and e-commerce as well as the development of whole sets of rules aimed at the regulation of electronic documentary instruments (see the eUCP) and their new forms, such as bank payment obligations.

more than 80% of all international trade transactions.[384] Therefore, it can be stated that international trade is to a considerable extent dependent on the successful functioning of trade finance documentary instruments.

The structure of the chapter is as follows. Firstly, I will put forward the case for the existence of *lex documentaria commercium* as a separate branch of *lex mercatoria*. I will do so by applying the criteria identified in section 2.4 of Chapter 2. Moreover, I will also argue that this branch of the modern law merchant is not solely an academic concept with little practical use: it has a very well-developed structure and sophisticated sources, which are regularly used and referred to in daily trade finance practice. Thus, a separate section of this chapter is dedicated to the discussion of the sources of *lex documentaria commercium* with their brief overview. Then I will turn to the problematic issue of determining the governing law in documentary instruments. Using the example of letters of credit (as the most popular documentary instrument which has attracted considerable academic attention),[385] I will discuss the associated difficulties and approaches taken by the judiciary in determining the governing law regime. I will emphasise that national law is not only incapable of providing an efficient and comprehensive regime for the regulation of documentary instruments, but in reality imposes more barriers to commercial parties involved in international trade. Thus, in order to overcome such shortcomings, national law actively encourages and employs non-national instruments developed by private industry associations. Therefore, I will argue that *lex documentaria commercium* is suitable for the regulation of the issues arising out of documentary instruments' functioning and should be viewed as a default governing law regime.

3.2. *Lex documentaria commercium* as a separate branch of *lex mercatoria*

This section puts forward the arguments in support of the existence of a separate branch of *lex mercatoria* in the area of trade finance, namely *lex documentaria commercium*. As per the criteria identified in section 2.4 of Chapter 2, the section will argue that *lex documentaria commercium* consists of two fundamental principles (the independence [autonomy] principle and the principle of strict compliance) and is promoted through the efforts of the ICC, a leading private organisation in the field which attracts considerable support from the international community and states. Lastly, the section will give an overview of the sources of *lex documentaria commercium*.

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[384] ICC, '2018 Global Trade – Securing Future Growth: ICC Global Survey On Trade Finance' (10 edn, 2018) 23. See also WTO, 'Trade Finance and SMEs Bridging the Gaps in Provision' (2016) 6; see also WTO, 'Trade Finance' (*World Trade Organisation*, [no date]) <https://www.wto.org/english/thewto_e/coher_e/tr_finance_e.htm> accessed 20 September 2019. In particular, despite recent unfortunate trends of a gradual decrease in volumes of letters of credit usage since 2013, the average value of letters of credit has substantially risen (from USD 350,000 in 2015 to USD 537,000 in 2017). At the same time, it is worth noting that in 2014 the average value of a letter of credit amounted to USD 643,000 (see relevant annual ICC reports).

[385] Characterised as "the life-blood of international commerce" by Kerr J in his milestone judgment in *R. D. Harbottle (Mercantile) Ltd. v National Westminster Bank Ltd. and Others* [1978] Q.B. 146 at 156. See also Lord Chorley who similarly characterised letters of credit as "the crankshaft of modern commerce", Lord Chorley, *The Law of Banking* (6th edn, Sweet & Maxwell 1974) 225.

3.2.1. Principles of *lex documentaria commercium*

As discussed in sections 2.3.2 and 2.4 of Chapter 2, one of the central criteria for the recognition of a branch of *lex mercatoria* is the availability of certain distinct principles, customs and usages, which form the centrepiece of such branch's regulation. Therefore, *lex documentaria commercium* should have relevant trade finance principles, customs and usages which form the basis for norm formation within such a branch.

Prominently, it seems that among all branches of the modern law merchant, *lex documentaria commercium* has better established and recognised unique principles (sometimes also referred to as doctrines): the independence (autonomy) principle and the principle of strict compliance.[386] In academic literature these two principles are mostly mentioned in the context of letters of credit, but they are also found and applied in the regulation of other documentary instruments.[387] It is also notable that the practical application of the principles has further elaborated a number of adjacent principles and relevant exceptions to them.

3.2.1.1. Independence (autonomy) principle

The independence (or also known as autonomy) principle is of crucial importance to the system of documentary instruments.[388] In fact, it is provided that the independence principle is the reason why documentary instruments are useful tools for international trade financing.[389] Whilst academic literature has been mostly focusing on the independence principle in the context of letters of credit, it is notable that the same principle forms the basis of functioning of most, if not all, documentary instruments.

In short, the autonomy principle provides that a documentary instrument (such as letters of credit, demand guarantees and bank payment obligation) constitutes a separate transaction which is in no way affected by the underlying contract, thus making the payment obligation entirely documentary, *i.e.* on the basis of the documents presented and not the performance in accordance with the underlying transaction.[390] Perhaps, a classic (and universally cited) description of the essence of the autonomy principle is provided by Lord Diplock in *United City Merchants (Investments) Ltd. v Royal Bank of Canada*[391] in the context of letters of credit:

> "If, on their face, the documents presented to the confirming bank by the seller

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[386] Davidson (n 38) 129; Khademan (n 163) 25; Clive Schmitthoff, *Export Trade: The Law and Practice of International Trade* (9th edn, Stevens & Sons 1990) 404.

[387] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 300.

[388] Chathura Warnasuriya, 'Minimising Litigation on Presentation of Documents under Letters of Credit: An Alternative Approach to the Uniform Customs and Practice for Documentary Credits' (PhD Thesis, Brunel University 2017) 22-23; Levit (n 144) 134; Mann (n 56) 2500; Hamed Alavi, 'Documentary Letters of Credit, Principle of Strict Compliance and Risk of Documentary Discrepancy' (2016) 19 Korea University Law Review 3, 5; Philip Teoh, 'Letters of Credit: A Conflict of Laws Perspective' (1990) 2 Singapore Academy of Law Journal 51, 52.

[389] Ellinger and Neo (n 388) 116, 139.

[390] Janet Levit, 'Bottom-up Lawmaking through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (2008) 57 Emory Law Journal 1147, 1167.

[391] [1983] 1 A.C. 168 at 184.

> conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment."

Notably, the autonomy principle has achieved widespread acceptance[392] and can be found in a variety of sources, including international conventions (see the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit), national statutory law, case law of common law systems and the ICC-developed soft law.

With regard to the latter, the autonomy principle of letters of credit is distinctly mentioned in Article 4(a) of the latest UCP 600: "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary." Moreover, Article 4(b) of UCP 600 goes further to stipulate that any attempt to make copies of the underlying contract, proforma invoice, etc. to be an integral part of a documentary credit should be discouraged from the outset.

Lord Denning, when discussing the principle of autonomy of letters of credit from an underlying transaction as provided in the UCP, stated that if any court in any country disregards this principle and orders that payment be not made under a letter of credit, it would strike at the very heart of that country's international trade:

> "No foreign seller would supply goods to that country on letters of credit — because he could no longer be confident of being paid. No trader would accept a letter of credit issued by a bank of that country if it might be ordered by its courts not to pay. So it is part of the law of international trade that letters of credit should be honoured

[392] Ellinger and Neo (n 388) 357.

— and not nullified by an attachment order at the suit of the buyer."[393]

Importantly, similar provisions on independence from any underlying relationship between parties to a transaction are included in the ICC-developed soft law regulating other types of documentary instrument.[394] For example, Article 5 of the URDG 758 provides for the independence of a guarantee and a counter-guarantee, Articles 1.06 and 1.07 of the International Standby Practices (the ISP) 98 specifies independence of a stand-by letter of credit and the autonomy of a bank payment obligation is stipulated in Article 6 of the Uniform Rules for Bank Payment Obligations (the URBPO) 750.[395] Similarly, courts in various jurisdictions have confirmed that the autonomy principle also applicable to stand-by letters of credit and demand guarantees.[396] In practice, the outcome of the autonomy principle is that the various contracts in, for example, a letter of credit transaction, such as between an applicant and a beneficiary, between an issuing bank and an applicant, or between an issuing bank and a nominated bank are separate and independent of each other.[397]

The independence principle has resulted in the additionally elaborated rule that banks deal with documents and not with goods, services or performance to which the documents may relate (some also refer to it as the doctrine of documents).[398] This rule is specifically addressed in Article 5 of the UCP 600, Article 6 of the URDG 758, Articles 1.06 and 1.08 of the ISP 98 and Article 10 of the URC 522.[399] The requirement is that the documents should on their face correspond to the terms and conditions specified in a documentary credit and the banks are not concerned with (and should not investigate) the actuality of facts represented by the documents.[400] Ellinger and Neo justly described this as the manifestation of the autonomy principle.[401]

Moreover, as a result of the autonomy principle, which makes payment dependent only upon the presentation of relevant documents, the rule of "pay first, argue later" has been elaborated, which is said to be promoting international trade and signifies modern *lex mercatoria* in international trade finance instruments.[402] This rule primarily serves to discourage applicant-inspired litigation, *i.e.* when the applicant tries to prevent the bank from payment due to the (alleged) beneficiary's breach of the underlying contract, even though the terms and conditions

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[393] *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 W.L.R. 1233 at 1242.

[394] See also Ellinger and Neo (n 388) 139.

[395] One may also draw an analogy with the independence of reimbursement authorisation from the terms and conditions of the credit in bank-to-bank reimbursements under Article 3 of the URR 725.

[396] See W G Schulze, 'The UCP 600: A New Law Applicable to Documentary Letters of Credit' (2009) 21 South African Mercantile Law Journal 228, 236 referring to South African case *Union Carriage and Wagon Co Ltd v Nedcor Bank Ltd (1996 CLR 724 (W))*.

[397] Ebenezer Adodo, *Letters of Credit: the Law and Practice of Compliance* (OUP 2014) 153.

[398] Schulze (n 396) 239.

[399] Similarly, Article 7 of the URBPO 750 specifics that the Involved Bank deals with data and not with documents, or the goods, services or performance to which the data or documents may relate.

[400] Adodo (n 397) 154; Schulze (n 396) 239.

[401] Ellinger and Neo (n 388) 225.

[402] ibid 300-301; Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (n 39) 406-407; Alavi (n 388) 6; see also *Eakin v. Continental Illinois National Bank & Trust Co.* 875 F.2d 114.116. (1989).

of the letter of credit have been satisfied by the beneficiary.[403]

It is commonly accepted that there is one exception to the independence principle: the fraud exception. The fraud exception to the autonomy principle occurs when documents presented under a documentary instrument are fraudulent and contain, expressly or by implication, a material misrepresentations of facts.[404] It is worth noting that any matters in relation to fraud are not dealt with in any of the ICC-developed soft law. Goode explains such reluctance of the ICC by the fact that the ICC is not a law-making institution and thus cannot dictate to national legislatures or impose its understanding of fraud on them.[405] Thus, despite the importance of the fraud exception, its understanding and application has been left to national courts.

Interestingly, there have been debates as to whether there are any other exceptions to the autonomy principle. Arguments were brought forward that new exceptions should be introduced or that the fraud exception should be expanded, *e.g.* in cases of lack of faith, fault or nullity (when the beneficiary presents a document, but is not aware that such a document has been forged by a third party).[406] Because the ICC rules do not deal with fraud, treatment of the above circumstances solely depends on national law and may differ from jurisdiction to jurisdiction.[407] However, it should be noted that it is broadly accepted that any exceptions to the autonomy principle should be certain and well-defined, because otherwise the whole documentary instruments system would be precluded from intended functioning.[408] Thus, any arguments for additional exceptions or expansion of the fraud exception should be treated by courts with the utmost caution.

3.2.1.2. Strict compliance principle

The principle of strict compliance is the second fundamental principle of documentary instruments' operation.[409] It emphasises that the issuing bank's undertaking to honour the credit is effective only upon presentation of complying documents which are stipulated in the respective documentary instrument. At the same time, if the issuing bank accepts the non-conforming documents and makes payment against them, the bank will not get reimbursement from the applicant. In fact, contrary to the principle of independence, the principle of strict compliance protects the interest of an applicant under the documentary credits process which

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[403] Schulze (n 396) 236.

[404] See *United City Merchants (Investments) Ltd. v Royal Bank of Canada* [1983] 1 A.C. 168 at 184; *IE Contractors Ltd v Lloyds Bank PLC* [1990] 2 Lloyd's Rep 496 at 499; *United Trading Corporation SA v Allied Arab Bank Ltd and Others* [1985] 2 Lloyd's Rep 554 at 561.

[405] Roy Goode, 'Abstract Payment Undertakings in International Transactions' (1996) 22 Brooklyn Journal of International Law 1, 4.

[406] See the discussion in Ellinger and Neo (n 388) 168-174; Hamed Alavi, 'Exceptions to the Principle of Independence in Documentary Letters of Credits' (PhD Thesis, Universitat Autonoma de Barcelona 2018) 97-111; see also *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2002] 1 WLR 1975.

[407] Compare, for example, the treatment of a nullity exception: whilst not recognised in England (*Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2002] 1 WLR 1975), it was accepted in Singapore (*Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2003] 1 SLR 597).

[408] Ellinger and Neo (n 388) 174; see also Lu Lu, 'The Exceptions in Documentary Credits in English Law' (PhD Thesis, University of Plymouth 2011) 236-276.

[409] See Alavi, 'Principle of Strict Compliance' (n 388) 7; Ellinger and Neo (n 388) 326-327.

requires shipment of promised goods by the beneficiary before receipt of payment.[410]

Nearly a century ago, Lord Sumner, when commenting on documents compliance in a letter of credit transaction in *Equitable Trust Co of New York v Dawson Partners Ltd,*[411] stated that "there is no room for documents which are almost the same, or which will do just as well".[412] Since then strict compliance has been often been considered as a necessary principle of a documentary credit transaction,[413] which has resulted in courts adopting a mirror image interpretation of the principle by requiring the documents presented by beneficiaries to be literally,[414] or exactly,[415] or precisely[416] in compliance with the terms of a letter of credit. The rationale of such approach for strict compliance was to safeguard the interests of the applicant,[417] and should the issuing bank make a payment against non-conforming documents (even if the deviation from the requirements stated in the respective letter of credit is minimal) without the consent of the applicant, it does not fulfil the applicant's mandate.[418]

However, such a mirror image interpretation is undoubtedly against commercial realities and considerably hampers trade activities of merchants as well as banks. For the former, it is virtually impossible to procure an exact set of documents as per the terms of a letter of credit because many such documents are prepared by the personnel of third parties (shipping agents, insurers, carriers, etc.), over which the beneficiary has no control.[419] For banks, the examination of documents turns into a proofreading exercise which should be performed within a very limited period of time.[420]

It is thought that that the principle of strict compliance has likely been developed by the judiciary rather than through trade finance practice.[421] In fact, the UCP (as well as the ISP and URDG) requires documents to be merely in compliance.[422] In his analytical commentary on the UCP 600 Byrne described the principle as an express conditional obligation which must be strictly fulfilled but in situations where the condition is implied it can be substantially fulfilled by a

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[410] Warnasuriya (n 388) 26.
[411] (1927) 27 Ll L Rep 49.
[412] ibid 52.
[413] Adodo (n 397) 154-156.
[414] *Voest-Alpine International Corp v Chase Manhattan Bank*, 707 F 2d 680, 683 (1975); *Banque Paribas v Hamilton Industries International Inc*, 767 F 2d 380, 384 (1985).
[415] *Philadelphia Gear Corp v Central Bank*, 717 F 2d 230, 236 (1983).
[416] *Courtaulds North America Inc v North Carolina National Bank*, 528 F 2d 802, 805-6 (1975).
[417] Alavi, 'Principle of Strict Compliance' (n 388) 7; Adodo (n 397) 156-157.
[418] Schulze (n 396) 240.
[419] Peter Ellinger, 'New Problems of Strict Compliance in Letters of Credit' (1988) The Journal of Business Law 320, 321.
[420] Adodo (n 397) 156.
[421] John Dolan, 'The Strict Compliance Rule in a Recession' (2009), 15 (4) DCInsight; James Byrne and others, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice 2010) 540-706.
[422] See Article 13(a) of the UCP 500; Artcile 14(a) of the UCP 600, Article 4.01 of the ISP98, Article 19(a) and (b) of the URDG 758; see also DOCDEX Decisions No. 221 and 233, in which it is specified that the UCP has no reference to the strict compliance principle and an absolute reliance on such principle is contrary to the UCP's spirit and nature. It should also be mentioned that DOCDEX Decision No. 334 used inconsistent terminology when describing the demand launched by the beneficiary to be in strict compliance with the terms and conditions of the guarantee.

performance that is of the same standard.[423]

Not surprisingly, the principle has been a fertile subject of academic studies and practical analyses, which aimed to answer the question of how strict the compliance should be. For example, there have been suggestions to classify the discrepancies into irrelevant irregularities with no effect on the principle of strict compliance and material discrepancies which violate the principle of strict compliance, resulting in the appearance of an additional principle of substantial compliance.[424]

Moreover, it seems that the attitude of courts and national legislatures have also evolved over time. In particular, whilst §5-108(a) of the Uniform Commercial Code (the UCC) requires the banks to examine documents in strict conformity with the terms and conditions of the letter of credit, the official commentary on this section provides that such strict compliance does not mean slavish conformity.[425] Some anecdotal evidence also suggests that towards the end of the twentieth century the courts became more flexible in the treatment of the strict compliance principle and have commonly considered that strict compliance should not be equated to a mirror image interpretation.[426] At the same time, the interpretation of the strict compliance principle by different courts in different jurisdictions varies significantly.[427]

The issue of the level of strictness for the examination of presented documents is not simply an academic exercise, but has significant practical implications. In fact, the ICC has claimed that as many as 70% of documents presented for examination under letters of credit are discrepant or exhibit inconsistencies from the negotiated terms.[428] Additionally, according to Mann's empirical study of 500 documentary credits in several American banks, the presentations conformed to the terms and conditions of letters of credit on only 135 occasions (27%).[429] Whilst the nature of discrepancies varied, in *all* of the cases (500 transactions) the applicant waived relevant discrepancies, thus allowing payment under the letter of credit.[430] In addition, Mann conducted interviews with a number of bank officials, all of whom confirmed that the refusal to effect payments under a letter of credit appears in less than one percent of transactions.[431]

Nevertheless, it is worth noting that Article 16(b) of the UCP 600 (similarly to Article 14(c) of the UCP 500) provides that when an issuing bank determines that a presentation does not comply, it may *in its sole judgement* approach the applicant for a waiver of the

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[423] Byrne and others (n 422) 540-706.
[424] Alavi, 'Principle of Strict Compliance' (n 388) 8; Warnasuriya (n 388) 27-28.
[425] See the official comment to § 5-108 of the USA UCC in Ronald Mann, Elizabeth Warren and Jay Lawrence Westbrook, *Comprehensive Commercial Law 2016 Statutory Supplement* (2016 edn, Wolters Kluwer 2016).
[426] McLaughlin (n 64) 752; Ellinger and Neo (n 388) 228-229.
[427] Dolan, 'The strict compliance rule in a recession' (n 422).
[428] ICC, 'ICC Response to the Basel Committee Consultative Document on "Strengthening the Resilience of the Banking System"' (ICC Document No. 470/1139, 16 April 2010) 4.
[429] Mann (n 56) 2502-2512; see also Manganaro (n 39) 274.
[430] Mann (n 56) 2513-2514.
[431] ibid 2514.

discrepancy/discrepancies, *i.e.* it is not an obligation of the issuing bank. Moreover, even if the issuing bank decides to contact the applicant and communicate any discrepancies, it is not bound by the waiver (if any) given by the applicant.[432] Thus, whilst Mann's study acknowledges that applicants readily provide their waivers for discrepant documents, it is primarily for the banks to decide whether to seek and apply such a waiver. Consequently, if for any reason banks take a pedantic approach towards the examination of documents and application of the strict compliance principle even in relation to minor differences in the documents, this may significantly undermine the reliability of documentary instruments for international trade. When considering the revision of the UCP, the ICC Banking Commission cited the above unfortunate trends of a high proportion of the documents which are treated by the banks as discrepant, noting that this has a negative impact on letters of credit as a means of payment in international trade.[433]

Following the 2007 revision of the UCP, it was noted that there has been a considerable relaxation of the strict compliance principle.[434] Primarily this can be seen from the comparison of the UCP 500 and the UCP 600. The former's Article 13(a) provided that upon examination of the presented documents banks should treat documents which appear on their face to be inconsistent with one another as non-compliant with the terms and conditions of the letter of credit. However, UCP 600's Article 14(d) provides that data in a presented document need not be identical to data in any other document but must not be in conflict. When commenting on this, Levit correctly stated that the UCP 600 explicitly reoriented the standard of document review from rigid formalism to functional compliance.[435] In addition, the International Standard Banking Practice (the ISBP) has been an important development for defining the situations in which strict compliance is not necessary.

At the same time, it is worth noting that the ICC Banking Commission has not reached a consensus about the strictness of the principle. In its latest report on the subject the Executive Committee of the ICC Banking Commission has attempted to determine the issue by analysing a variety of sources, such as ICC Rules, ICC Opinions, DOCDEX Decisions, judgments of courts in various jurisdictions and academic works.[436] Following relevant examination of these sources the Committee acknowledged the differences in interpretation of the principle (even among the ICC Opinions) as well the Committee's inability to provide an answer or give any guidance, primarily because the UCP is silent on the issue.[437] The Commission, however, noted that "developments in the past have proved that, as time goes by, it is customs and

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[432] Gary Collyer, *Guide to Documentary Credits* (5th edn, IFS University College 2015) 372.
[433] Manganaro (n 39) 274-275.
[434] ibid 273-274, 283; Sara Younger, 'The Reality of the Strict Compliance Rule' (2010) 16 (1) DCInsight; Philippe Bélanger and Jason Phelan, 'International Documentary Credit Disputes: A Review of ICC Arbitration Cases' (2015) 2 ICC Dispute Resolution Bulletin 115.
[435] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1218.
[436] Executive Committee of the ICC Banking Commission, 'Notes on the Principle of Strict Compliance – Issues Paper' (ICC Document No. 470/1261 2016).
[437] ibid 11.

practice that will provide the required clarity".[438] This fact that the issue is left to be determined by market practices is a clear illustration of *lex mercatoria* in action.

The above two principles are not a sole example of unique principles, usages, customs in trade finance. However, they are so strongly embedded into the functioning of documentary instruments that they have truly become central to any state or non-state issued regulation in the area. As a consequence, the independence (autonomy) principle and the principle of strict compliance are at the core of *lex documentaria commercium*, thus satisfying the first criteria for recognition of this branch of the modern law merchant.

3.2.2. Leading private industry association and support for its activities from states and the international community

Branches of the modern *lex mercatoria* (except for *lex petrolea*) could not exist without there being a specific private industry association which is responsible for the development and promotion of non-national regulation in the area.[439] Importantly, such a body must be in close cooperation with states and the international community in order for its norm-making to be recognised and supported. Within *lex documentaria commercium* such a role is allocated to the International Chamber of Commerce (the ICC).

The ICC was established in 1919 with the aim of representing private business in the global policy arena. It is worth noting that at that time there was no world system of rules to govern trade, investments, and financial or commercial related issues,[440] and documentary instruments were governed solely by banking practices and trade usages.[441] The ICC assumed responsibility for the codification of trade finance customs, practices and usages and has been developing these codifications ever since.[442] Thus, it is not surprising that over time the authority of the ICC has gradually been increasing and it has clearly become the central institution in the area of trade finance.

The organisation's goals have always been to promote international trade, responsible business conduct and a global approach to regulation through, *inter alia*, formulation of voluntary rules by which every day business is conducted and which are extensively used in an international setting, most notably in the area of trade finance.[443] The ICC Banking Commission has been at the heart of such development. Particularly, it has been argued that through incorporation of the ICC rules it will be easier for banks, trade practitioners, lawyers

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[438] ibid.

[439] See section 2.2.2 of Chapter 2.

[440] 'History' (*ICC*, [no date]) <https://iccwbo.org/about-us/who-we-are/history/> accessed 20 September 2019. See also George Ridgeway, *Merchants of Peace: the History of the International Chamber of Commerce* (2nd edn, Little, Brown and Company 1959).

[441] Ellinger and Neo (n 388) 22.

[442] Hamed Alavi, 'Documentary Letters of Credit, Legal Nature and Sources of Law' (2016) 17 (31) Journal of Legal Studies 106, 110.

[443] ICC, 'Who We Are' (*ICC*, [no date]) <https://iccwbo.org/about-us/who-we-are/> accessed 20 September 2019.

and courts to interpret documentary instruments correctly.[444]

Some view the ICC as the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.[445] Indeed, today the ICC claims to have a global network of over 6 million members in more than 100 countries[446] and an expert pool of nearly 3,000 people who make up the specialised working bodies on a broad range of issues within the organisation.[447] The organisation has become a global platform for businesses from a variety of geographical locations and its impact is likely to increase considerably in the years ahead.[448]

Notably, the role of the ICC as the main promulgator of *lex mercatoria* has been widely acknowledged. In fact, Fortier even directly links the rise of interest in the law merchant in the second half of the 20th century with the growth of the global authority of the ICC.[449] Indeed, over the last few decades the ICC has been remarkably active in promoting *lex mercatoria* in three main ways: through its arbitration service, through the codification of industry practices, and through the production of model form contracts governed by *lex mercatoria*.[450] Cuniberti suggested that the motives behind the ICC's desire to take the lead in the promotion of the law merchant are two-fold: a) to attract support and business from arbitrators, who embrace the idea of *lex mercatoria*'s revival; and b) to reduce model contracts' and uniform rules' production costs, *i.e.* minimise verification of compatibility with applicable mandatory rules of different jurisdictions.[451]

Whatever the true reasons behind the ICC's approach to position itself as the prime promoter of *lex mercatoria*, the fact is that it is strongly supported in such activities by the international community and by states, at least in the trade finance sector. For example, in December 2016 the ICC became the first ever private organisation to acquire Observer Status at the United Nations.[452] Fundamentally, the cooperation between the ICC and the United Nations Commission on International Trade Law (UNCITRAL) has resulted in the endorsement of

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[444] Kelly-Louw (n 40) 40.
[445] ibid 4.
[446] ICC, 'Who We Are' (n 443).
[447] 'Business Expertise' (*ICC*, [no date]) <https://iccwbo.org/about-us/who-we-are/business-expertise/> accessed 20 September 2019.
[448] David Meynell, 'History of the Banking Commission' (2014) 20 (1) DCInsight.
[449] Yves Fortier, 'New Trends in Governing Law: The New, New *Lex Mercatoria*, or, Back to the Future' (2001) 16 (1) ICSID Review - Foreign Investment Law Journal 10, 13.
[450] Cuniberti (n 23) 424-434; see also Fabio Bortolotti, 'The ICC Model Contracts: a New Approach to the Drafting of Model Forms for International Trade' (2001) 8 International Business Law Journal 969; Fabio Bortolotti, 'Towards a New *Lex Mercatoria* Regarding International Commercial Agency: the ICC Model Commercial Agency Contract' (1995) 6 International Business Law Journal 685. In particular, in its model contracts the ICC often includes a choice of law clause that encourages the parties to choose non-national rules to govern their relations, see the ICC MODEL Distributorship Contract, the ICC Commercial Agency Model Contract, etc.
[451] Cuniberti (n 23) 428-434.
[452] 'Business and the United Nations' (*ICC*, [no date]) <https://iccwbo.org/global-issues-trends/global-governance/business-and-the-united-nations/> accessed 20 September 2019.

several UNCITRAL conventions by the former[453] and ICC uniform rules in the area of trade finance by the latter[454], which has undoubtedly enhanced harmonisation in the field.[455] Furthermore, the ICC-developed uniform rules have significantly influenced national and international trade finance law-making: they are often referred to in local statutes, cited and applied by courts (see sections 3.2.3 and 3.5 below).

Clearly, the standing of the ICC as a private association in the global trade finance arena is unique and unchallengeable. The ICC has produced a number of important regulations for the area, which have considerably shaped trade finance and enhanced uniformity. Moreover, the international community has been rendering its full support for the organisation's activities. Therefore, the second and third criteria for recognition of a branch of the new *lex mercatoria* in the area of trade finance has been satisfied. Thus, the existence of *lex documentaria commercium* is supported by the fulfilment of the first three criteria as identified in section 2.4 of Chapter 2, with the fourth and final criterion yet to be applied in Chapter 5 of this thesis.

3.2.3. Sources of *lex documentaria commercium*

For the purposes of validating the high level of sophistication of *lex documentaria commercium*, this section discusses the sources of this trade finance branch of the modern law merchant. As has been emphasised in section 1.1.3 of Chapter 1, the area of trade finance generally and documentary instruments in particular have a long history of regulation through trade usages and customs.[456] The ICC has been successful in the codification of trade finance practices, which has resulted in the production of a number of its uniform rules and regulations for a particular type of documentary instrument. Importantly, since, as described in section 3.2.2 above, the ICC receives unreserved support in its activities from private actors, states and the international community, ICC-developed norms have been globally accepted and regarded as an authoritative source of regulation. In fact, it is illustrative that any attempts by states to establish a uniform international framework for the regulation of documentary instruments have not been successful (see the example in section 3.2.3.1 below).

Moreover, only in rare instances has national law provided for specific regulatory provisions regarding documentary instruments. Furthermore, even if there are any provisions included in

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[453] 2014 – the UNCITRAL Convention on the Assignment of Receivables in International Trade 2001; 2006 – the United Nations Convention on the Use of Electronic Communications in International Contracts 2005; 1999 – the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit 1995. Additionally, in 2008 the ICC urged governments to consider ratification of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008.

[454] 2017 – Uniform Rules for Forfaiting 800 (2012); 2010 – Uniform Rules for Demand Guarantees 758 (2010); 2010 – INCOTERMS 2010; 2007 – Uniform Customs and Practices for Documentary Credits 600 (2007); 1998 - International Standby Practices (1998).

[455] In addition, the ICC is a member of the G20 CEO Advisory Group, and is engaged in a broad range of activities with the World Trade Organization, the World Intellectual Property Organization, represents business at global forums such as the World Summit on Sustainable Development, the UN Framework Convention on Climate Change and the annual Internet Governance Forum, etc, see 'G20' (*ICC*, [no date]) < https://iccwbo.org/global-issues-trends/global-governance/g20/> accessed 20 September 2019; 'Global Governance' (*ICC*, [no date]) < https://iccwbo.org/global-issues-trends/global-governance/> accessed 20 September 2019.

[456] Adodo (n 397) 5; Alavi, 'Legal Nature and Sources of Law' (n 442) 110.

national codifications, such provisions are often limited in their practical effect and cannot comprehensively cover the functioning of documentary instruments (see a detailed discussion on this in section 3.5 below). As a result of this, the area of trade finance is thriving with increased self-regulation, which over the years has transformed into a well-structured and self-contained system. Given its efficiency, it is not surprising that national law often supports and encourages reference to such a system and its sources.[457]

Below is the list of specific sources in which *lex documentaria commercium* can be found. It should be understood that general principles of law, which form the essence of *lex mercatoria*, should be qualified as the primary source which is applicable to all branches of *lex mercatoria* and therefore are not analysed herein.

3.2.3.1. United Nations Convention on Independent Guarantees and Stand-By Letters of Credit

Considerable attention was given to the drafting of the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit (the Convention). It was hoped that the Convention would provide for a uniform international framework for independent guarantees and stand-by letters of credit. However, after almost 25 years since the release of the Convention it is clear that it has failed to achieve its intended purpose and the trade finance community prefers soft law regulation over any other form of regulatory regime. In particular, except for the USA, no major trade finance jurisdiction has joined the Convention.[458] In fact, there is only a handful of signatories to the Convention.[459]

At the same time, the impact of the Convention cannot completely be ignored. Indeed, the Convention has been somewhat innovative in several respects and was the first attempt to promote a number of principles for documentary instruments functioning on a global mandatory basis, *i.e.* not via soft law. Most prominently, the Convention acknowledges the need to promote uniformity and explicitly encourages the observance of good faith in the international practice of independent guarantees and stand-by letters of credit.[460] However, in order to achieve such uniformity the drafters of the Convention decided to take an all-embracing approach and provided for some rather controversial measures, such as the insertion, for the

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[457] Which directly corresponds to the typology offered by Michaels, thus supporting the notion of the interdependence of state and non-state developed law and the role of the ICC in this relationship (see the discussion in section 2.2.3 of Chapter 2 of this thesis). See more on such typology offered by Michaels in Michaels, 'The Re-State-Ment of Non-State Law' (n 177) 1236.

[458] As had been stated by De Ly even before the Convention came in force, "the success of the Convention will not be determined by the speed of its entry into force, but rather by the particular countries which ratify it", see Filip De Ly, 'The UN Convention on Independent Guarantees and Stand-by Letters of Credit' (1999) 33(3) The International Lawyer 831, 837.

[459] At the time of writing the parties to the Convention include the USA, Belarus, El Salvador, Panama, Ecuador, Gabon, Kuwait, Liberia and Tunisia.

[460] See Article 5 of the Convention.

first time in legal history of international law-making, of a defined fraud exception[461] and the choice of law rules. This, perhaps, is the reason why the Convention has not been widely accepted.[462]

Importantly, the Convention gives legislative support to the autonomy of the parties to apply agreed rules, usages and international practice applicable to independent guarantees and stand-by letters of credit.[463] The UNCITRAL Explanatory Note to the Convention categorically states that the Convention refers to the ICC-developed rules in this area, namely the UCP and the URDG.[464] The Note goes even further by stipulating that the Convention is essentially consistent with these rules and aims to supplement them by working in tandem.[465] Indeed, much of the terminology used in the Convention is borrowed from the UCP and URDG.[466] In this context, at least one author characterised the Convention as an expression of *lex mercatoria*.[467] In fact, this is a rare example of soft law industry regulations being directly recognised, supported and encouraged for use by means of an international convention. Moreover, further support was given by UNCITRAL through the endorsement of the ICC-developed soft law rules,[468] and it is broadly acknowledged that both organisations share the same drive for harmonisation and uniformity in international trade.[469]

The Convention also offered a simple approach towards the applicable law regulating independent guarantees and stand-by letters of credit. Namely, Article 21 recognises that priority should be given to a choice stipulated in the documentary instrument or demonstrated by its terms or conditions or agreed elsewhere by the guarantor/issuer and the beneficiary. Only in the absence of such choice should the undertaking be governed by the law of the State in which the guarantor/issuer has its place of business (Article 22).

If analysed from the perspective of *lex documentaria commercium*, Article 21 of the Convention not only permits, but gives priority to, the parties to subject their undertaking to non-national

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[461] See para 45 of the UNCITRAL Explanatory Note to the Convention: "A main purpose of the Convention is to establish greater uniformity internationally in the manner in which guarantor/issuers and courts respond to allegations of fraud or abuse in demands for payment under independent guarantees and stand-by letters of credit". Some also explain such an approach due to the Convention, as opposed to the ICC-developed rules, represents hard law, see Kelly-Louw (n 40) 37; Warnasuriya (n 388) 188-189.

[462] De Ly (n 458) 837. In fact, since such unacceptance reduces the practical value of the Convention, it may be argued that the status of the Convention as one of the keys sources of *lex documentaria commercium* is undermined.

[463] See Articles 5, 13 and 16 of the Convention.

[464] See paras 5 and 36 of the UNCITRAL Explanatory Note to the Convention.

[465] See para 5 of the UNCITRAL Explanatory Note to the Convention. See also 'ICC Endorsement of the UNCITRAL Convention on Independent Guarantees and Stand-By Letters of Credit' (*ICC*, 21 June 1999) <https://iccwbo.org/content/uploads/sites/3/1999/06/ICC-endorsement-of-the-UNCITRAL-Convention-on-independent-guarantees-and-stand-by-letters-of-credit.pdf> accessed 20 September 2019.

[466] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1179-1181.

[467] See N Horn, 'The United Nations Convention on Independent Guarantees and the *Lex mercatoria*' (Centro di studi e ricerche di diritto comparator e straniero, Conferenze e Seminari, 1997) and N Horn, 'Die UN-Kanvention iber unabhingige Garantien: ein Beitrag zur *Lex Mercatoria*' (1997) 9 RIW 717 as cited in De Ly (n 458) 845.

[468] 2017 – Uniform Rules for Forfaiting (URF 800); 2010 – Uniform Rules for Demand Guarantees (URDG 758); 2010 – INCOTERMS 2010; 2007 – Uniform Customs and Practices for Documentary Credits (UCP 600); 1998 - International Standby Practices (ISP98).

[469] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1179-1181.

soft law regulations. This is especially visible through a comprehensive analysis of the Convention's provisions, which, *inter alia*, provide for regulation of the conduct, rights and obligations of the guarantor/issuer and the beneficiary as well as standards of document examination by any applicable rules, usages and international practice.[470]

Whilst the Convention has not achieved widespread acceptance among states and private actors, one should note the instrument's drive for uniformity and certainty in the use of independent guarantees and stand-by letters of credit. At the same time, one may also wonder whether there was the need to achieve uniformity and certainty through the drafting of a separate convention when there already existed quite a sophisticated framework for regulation of the area provided by ICC soft law. It is likely that the drafters of the Convention were of the opinion that restatement of soft law provisions in a mandatory international instrument will lead to greater degree of uniformity. Unfortunately, as has been shown, such an approach has not found much support.

3.2.3.2. ICC-developed uniform rules and other instruments

3.2.3.2.1. The Uniform Customs and Practice for Documentary Credits 600 (the UCP)

It has been argued that UCP is the most successful private instrument ever developed for international trade and that it is incorporated in the vast majority of letters of credit.[471] As Lord Denning commented in 1981, the UCP "have been adopted by the banks in all, or practically all, the countries of the world — from China to Andorra — from Cuba to Nauru. All subscribe to the Uniform Customs and Practice [...]".[472]

The UCP is widely considered as taking root from the law merchant[473] and nowadays forming an integral part of the international mercantile process.[474] Its role has been described as harmonising, clarifying and standardising commercial practices of letter of credit operations around the world.[475]

It has been shown through a number of studies that arbitrators, judges and the legislature are generally sensitive to and carefully follow the objectives of the UCP.[476] In fact, while the UCP is not technically law, courts in the United States and elsewhere frequently use it to decide letters of credit disputes.[477] This is mainly because most national laws do not contain any detailed provisions regulating documentary instruments (letters of credit in particular),[478] thus

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[470] Articles 13, 14 and 16.

[471] Schulze (n 396) 230; Adodo (n 397) 12; Eric Caprioli, 'Conflicts of Laws in Documentary Credit Contracts, a Comparative Law Approach' (1991) 7 International Business Law Journal 905, 911. See also Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (n 39) 397; Kelly-Louw (n 40) 9; Ellinger and Neo (n 388) 45.

[472] *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 W.L.R. 1233 at 1242.

[473] Simapungula (n 39) 20; Manganaro (n 39) 273.

[474] Davidson (n 38) 140.

[475] Adodo (n 397) 12; Teoh (n 388); Kelly-Louw (n 40) 8.

[476] Adodo (n 397) 13; Davidson (n 38) 131.

[477] Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 128.

[478] See more details in section 3.5 below.

effectively leaving the UCP as the only coherent source of law to refer to.[479] In addition, the success of the UCP may be also attributed to its fluidity, notably because it has been transformed in accordance with changing times and technologies, thus accommodating all contemporary practical developments in the area of trade finance.[480]

Moreover, there are also claims that the UCP is so commonly used among banks that it should be applied irrespective of whether parties have incorporated it.[481] As Chhina remarked, judicial reference to and application of the provisions of the UCP in cases where the parties have not unequivocally incorporated it would be the real test for the significance of the UCP.[482] And, indeed, there is a substantial number of court cases, particularly in England[483] and the USA,[484] when judges referred to certain provisions of the UCP despite there being no express incorporation of the uniform rules into a documentary instrument.[485] Moreover, national courts, when deciding letters of credit disputes, regularly refer to UCP provisions even in circumstances where there is a domestic statute designed for related issues.[486]

The nature of the UCP is not straightforward.[487] Most scholars would recognise it as soft law. At the same time, there are apparent disagreements among scholars regarding the type of soft law the UCP belongs to. Within academic literature it is possible to distinguish several views. For example, Ellinger and Neo state that the UCP is a set of standard terms and conditions which are usually applicable only when incorporated in the relevant documents.[488] In support of this they cite Article 1 of the UCP, which provides that the UCP is binding on the parties when the text of the credit categorically indicates that it is subject to UCP. In contrast, Chhina and several others criticise such an approach as being solely positivist, and define the UCP as an international commercial custom[489] or a compilation of international customs and practices.[490] The proponents of such view support it by citing court judgments wherein the UCP

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[479] James Byrne, 'Contracting out of Revised UCC Article 5 (Letters of Credit)' (2006) 40 Loyola of Los Angeles Law Review 297, 305.

[480] Davidson (n 38) 140.

[481] See references to such claims as made in Adodo (n 397) 91; Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (n 39) 19 at footnote 10.

[482] Ramandeep Chhina, 'The Uniform Customs and Practice for Documentary Credit (the UCP): Are They Merely a Set of Contractual Terms?' (2015) 30 (2) Banking & Finance Law Review 245

[483] See, for example, *Jl MacWilliam Co. v. Mediterranean Shipping Co. SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 A.C. 423; *Westpac Banking Corp. v. SouthCarolina National Bank*, [1986] 1 Lloyd's Rep. 311; *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)* [2003] 2 All E.R. 785, [2003] 1 Lloyd's Rep. 571 (Eng. H.L.); *Siporex Trade SA v. Banque Indosuez*, [1986] 2 Lloyd's Rep. 146; *AttockCement Co. v. Romanian Bank for Foreign Trade*, [1989] 1 Lloyd's Rep. 572, 133 S.J.1298, [1989] 1 W.L.R. 1147 (Eng. C.A.); *Wahda Bank v. Arab Bank Plc,* [1994] 2 Lloyd's Rep. 411; *Golodetz & Co Inc v Czarnikow-Rionda Con Inc* [1979] 2 Lloyd's Rep 450

[484] See, for example, *Morgan Guar. Trust Co. of New York v. Vend Technologies, Inc* 100 A.D.2d 782, 474 N.Y.S.2d 67 (N.Y. A.D. 1st Dept., 1984); *Oriental Pac (US) Inc v Toronto Dominion Bank* 357 NYS 2d 957 (NY 1974).

[485] See also Caprioli (n 471) 908; Chhina (n 482) 246-252.

[486] Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 140.

[487] ibid; Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1201; Ramandeep Chhina, 'The Legal Basis for the Application of the Uniform Customs and Practice for Documentary Credits (UCP) in England and Canada' (2008) 14 (3) Journal of International Maritime Law 228, 229-230.

[488] Ellinger and Neo (n 388) 45; see also Khademan (n 163) 343-344.

[489] Chhina, 'The Uniform Customs and Practice for Documentary Credit (the UCP)' (n 482) 253-262.

[490] Kelly-Louw (n 40) 8; see also Khademan (n 163) 345-346.

was referred to without its express incorporation by the parties (see above). Additionally, the name of the document itself also pushes towards the conclusion of a compilation of customs and practices.

However, Adodo disagrees with the position that the UCP represents a custom or practice. In particular, he notes that the UCP cannot be representative of customary banking practice, because some of its provisions conflict with commercial common sense and established jurisprudence in a number of countries.[491] With regard to the former, he gives the illustration of Article 10(a) of the UCP 600 which does not include the applicant among those who should give consent to the amendment or cancellation of a letter of credit. Regarding the latter (conflict with established jurisprudence), Adodo provides examples of court judgments in the USA, England, Singapore and Hong Kong[492] that any conditions included in a documentary credit without specification of the document to indicate compliance with such a condition should be binding on the parties, whereas Article 14(h) of the UCP stipulates the contrary and urges banks to disregard such conditions when examining compliance of the presentation. However, it is unlikely that Adodo will receive much support from trade finance actors on this highly positivistic point:[493] it seems that in the judgments he listed it was rather the failure of judges to interpret and apply correctly the fundamental principle of independence and its additionally elaborated rule that banks deal with documents only.

Another view is to treat the UCP as a body or set of rules. In support of such a view it is stated that Article 1 of the UCP 600 (for the first time in the UCP's drafting history) expressly refers to the UCP as rules.[494] Moreover, because nowadays banks universally proclaim their adherence to these rules and many banks will not issue letters of credit unless the parties explicitly state that the UCP governs such documentary instrument, as well as because of the abovementioned frequent reference to the UCP by courts, some go as far as to state that in modern times functionally and technically the UCP has become hard law.[495] This view is especially contrasting with the view of those who treat the UCP as a supranational code or modern *lex mercatoria*.[496]

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[491] See Adodo (n 397) 13-14.

[492] *International Banking Corp v Irving National Bank*, 274 F 122 (SDNY, 1921), *Banco Nacional Ultramarino v First National Bank of Boston*, 289 F 169 (D Mass, 1923); *Banque de L'Indochine et de Suez SA v JH Rayner (Mncing Lane) Ltd* [1982] Lloyd's Rep 65, 79-80; *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The 'Messiniaki Tolmi')* [1986] 1 Lloyd's Rep 455, 462-3, aff'd [1988] 2 Lloyd's Rep 217, 219-220; *Kumaigai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] 1 SLR(R) 227, aff'd [1997] 2 SLR(R) 1020; *Bank of Taiwan v Union Syndicate Corp* [1981] HKCI 86, [1981] HKC 205.

[493] See, for example, James Barnes, 'Non-Documentary Conditions and the Letters of Credit Independence Principle' (2008) 14 (4) DCInsight.

[494] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1201; see also Warnasuriya (n 388) 24.

[495] Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 140-141.

[496] Harold Koh, 'The Globalisation of Freedom' (2001) 2 The Yale Journal of International Law 305; William Tetley, 'Uniformity of International Private Maritime Law — The Pros, Cons and Alternative to International Conventions — How to Adopt an International Convention' (2000) 24 The Tulane Maritime Law Journal 775, 788; Isabella Chung, 'Developing a Documentary Credit Dispute Resolution System: An ICC Perspective' (1996) 19 (4) Fordham International Law Journal 1349, 1356; Audi Gozlan, *International Letters of Credit: Resolving Conflict of Law Disputes* (2nd edn, Kluwer Law International 1999) xxii; Kelly-Louw (n 40) 10.

Despite these academic debates in relation to the nature of the UCP and its power as a source of law, the effectiveness and role of the instrument for trade finance cannot be questioned.[497] Yet, the ICC (the Banking Commission in particular) is acutely aware that the UCP cannot be described as (and, in fact, is not intended to be) a comprehensive and complete legal system, simply because the UCP leaves certain issues for national law to determine, most notably the issue of fraud.[498] In fact, despite the ICC Banking Commission being urged by some to do so, the UCP does not contain any provision in regard to the governing law of a letter of credit.[499]

In addition, since the UCP is a private product, it requires, at least in the current law-making landscape, support and recognition by national authorities.[500] And, as I have discussed in section 3.2.2 above, such support is given to the ICC's activities generally and specifically to the UCP (see section 3.5 below), thus resulting in an extraordinary relationship between soft and hard law. At the same time, differences of interpretation of the UCP may arise depending on how the courts of various countries interpret its provisions,[501] which would effectively preclude uniformity of the regime established by the UCP. Therefore, the ICC (its Banking Commission) has provided a number of clarifications regarding how the UCP provisions should be interpreted (see discussion on the ISBP and ICC Opinions in sections 3.2.3.2.6 and 3.2.3.2.7 below).

In the context of the UCP two other ICC-developed rules should be mentioned: the eUCP (version 2.0) and the Uniform Rules for Bank-to-Bank Reimbursements (the URR) 725. The production of the eUCP resulted from the wish of the ICC Banking Commission to expand the reach of the UCP to encompass dematerialised documentation transactions transmitted electronically.[502] In addition, the aim of the eUCP is to advance traditional trade solutions in a digital environment, including providing uniformity, consistency and standardisation in customs and practice, and "conformity and congruence as opposed to divergent local, national and regional practice".[503] In the context of achieving these aims, the ICC defined its central task as the alignment of the definitions used in the eUCP with those used in local laws.[504] However, following the discovery of a plethora of various definitions which "differ among themselves in formulation if not meaning",[505] the Banking Commission ultimately decided to abandon such

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[497] Chhina, 'The legal basis for the application of the Uniform Customs and Practice for Documentary Credits (UCP) in England and Canada' (n 487) 230; Ellinger and Neo (n 388) 46; Khademan (n 163) 359. Adodo (n 397) 92. See also *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 Lloyd's Rep 572, 580.

[498] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1179; Chhina, 'The Uniform Customs and Practice for Documentary Credit (the UCP)' (n 482) 264; Kelly-Louw (n 40) 9.

[499] Adodo (n 397) 272.

[500] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1179.

[501] Simapungula (n 39) 542-543.

[502] Collyer (n 432) 481.

[503] 'eUCP Version 2.0' (*ICC*, June 2019) <https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf> accessed 20 September 2019; David Meynell, *Commentary on eUCP Version 2.0 eURC Version 1.0: Article-by-Article Analysis* (ICC 2019) <https://cdn.iccwbo.org/content/uploads/sites/3/2019/07/icc-commentary-on-eucp-2-0-and-eurc-1-0-article-by-article-analysis.pdf> accessed 20 September 2019.

[504] Meynell, *Commentary on eUCP Version 2.0 eURC Version 1.0: Article-by-Article Analysis* (n 503) 6-7.

[505] ibid.

an approach and adopt the terminology as used in the UNCITRAL Model Law on Electronic Commerce 1996 and the UNCITRAL Model Law on Electronic Transferrable Records 2017 so as to avoid any inconsistencies.[506]

The eUCP must be used in conjunction with the UCP and is sufficiently flexible to facilitate mixed part-paper and part-electronic presentations as well as fully electronic presentations.[507] Article e2 of the eUCP outlines its relationship with the UCP by stating that a credit subject to the eUCP is also subject to the UCP without express incorporation of the latter. At the same time, where the eUCP applies, its provisions prevail if they would produce a result different from the application of the UCP.[508]

Despite growing use of the UCP and the increased standardisation it has brought, the practice of interbank currency reimbursement was typically carried out in line with local market practice.[509] Therefore, the ICC decided to proceed with the development of a separate set of uniform rules in order to mitigate the risk for reimbursing banks in documentary credits.[510] Thus, the URR appeared in 1995 and were subsequently revised in 2008. In fact, the current UCP 600 is in synergy with the URR 725: Article 13(a) of the UCP 600 specifically requires a documentary credit to state whether the URR 725 are to apply.

3.2.3.2.2. International Standby Practices 98 (the ISP98)

Whilst not being legally distinct from demand guarantees, stand-by letters of credit were developed in the USA in order to bypass restrictions imposed on local banks at that time which prohibited the issuance of such guarantees.[511] Gradually, a separate practice of using stand-by letters of credit has developed, which has consequently resulted in the preparation of the ISP98 by the American Institute of International Banking Law and Practice. Whilst the ICC adopted and endorsed the ISP98, the process for such adoption, however, did not go smoothly because a significant number of national committees within the ICC were opposed to giving support to it.[512] In particular, it was argued that stand-by letters of credit did not require a separate regime from that of the UCP.[513] However, although a stand-by letter of credit possesses all the elements of a documentary credit subject to the UCP, its role is quite different from that of the letter of credit.[514] In essence, the principal difference between the two is that whereas the documentary letter of credit contemplates payment upon performance by the beneficiary, the stand-by letter of credit contemplates payment upon failure to perform by the

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[506] ibid. In fact, this reinforces the argument about close collaboration and mutual support rendered between the two organisations as stated in section 3.2.2. above.
[507] Collyer (n 432) 482; Mark Ford, 'Evolution, Not Revolution, For Online Trade Finance' (2008) 14 (1) DCInsight.
[508] Article e2 of the eUCP (version 2.0).
[509] Collyer (n 432) 463.
[510] ibid 464.
[511] ibid 435; Charles Del Busto, 'Are Standby Letters of Credit a Viable Alternative to Documentary Credits?' (1991) 6(2) Journal of International Banking Law 73, 75.
[512] Adodo (n 397) 12.
[513] ibid.
[514] Collyer (n 432) 438.

applicant.[515]

Given the above distinction, it is not surprising that, whilst ISP98 shares many common similarities with the UCP (and, in fact, has actually shaped some of the drafting of UCP 600),[516] a large part of the UCP does not apply to stand-by letters of credit, or is inappropriate, while other issues that are vital in a stand-by letter of credit context are not addressed at all in the UCP.[517] Therefore, despite a minor number of stand-by letters of credit continuing to be issued subject to the UCP,[518] there is a growing international awareness that ISP98 provides a more relevant framework for a stand-by letter of credit which has resulted in most of these nowadays being issued under the ISP98 rather than being subjected to the UCP.[519]

Despite a different style and several differences in substance between the ISP98 and UCP 600,[520] the majority of provisions of the ISP98 have achieved or intend to achieve similar effect as the UCP. In fact, the ICC named the ISP98 as an evolutionary product of the application of the UCP to standbys.[521]

Importantly, Article 1.03 of the ISP98 clearly sets the scene with the stipulation that the rules shall be interpreted as mercantile usage with regard to:

(a) the integrity of standbys as reliable and efficient undertakings to pay;

(b) the practice and terminology of banks and businesses in day-to-day transactions;

(c) consistency within the worldwide system of banking operations and commerce; and

(d) worldwide uniformity in their interpretation and application.

Noticeably, the ISP98 positions itself as a supplement to the applicable law[522] and seemingly leaves some aspects for such a law to determine.[523] However, the ICC has emphasised that the majority of issues outlined in the ISP98 are seldom addressed by local law and that "progressive commercial law will often look to the practice as recorded in the ISP for guidance in such situations".[524] Thus, the aim of the ISP98 is evidently to complement local law rather than conflict with it,[525] which is clearly in line with the notion of interdependence of privately

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[515] Del Busto (n 511) 73.
[516] Collyer (n 432) 440.
[517] Kelly-Louw (n 40) 12.
[518] Collyer (n 432) 440; John Dolan, 'Analyzing Bank Drafted Standby Letter of Credit Rules, The International Standby Practice (ISP98)' (2000) 45 Wayne Law Review 1865, 1874.
[519] Kelly-Louw (n 40) 12; Collyer (n 432) 440. At the same time, see criticism of the inapplicability of ISP98 to certain aspects of established trade finance practice in Europe, thus leaving the instrument to be applicable only to US-based banks, see Jens Nielsen and Nicolai Nielsen, 'Standby Letters of Credit and the ISP 98: A European Perspective' (2000) 16 Banking & Finance Law Review 163.
[520] See *International Standby Practices ISP98* (ICC Publication No. 590 2010) 6-7.
[521] Maria Livanos-Cattaui, 'Foreword' in *International Standby Practices ISP98* (ICC Publication No. 590 2010) 3.
[522] See Article 1.02
[523] Such as a power or authority to issue a standby, or fraud aspects, see Article 1.05.
[524] *International Standby Practices ISP98* (n 520) 8; see also United Nations Commission on International Trade Law, 'Report of the Secretary-General on International Standby Practices (ISP98); (Annex II A/CN.9/477 Volume 31 Yearbook 2002) 581.
[525] *International Standby Practices ISP98* (n 520) 8.

developed regulation and national law as expressed throughout this thesis. In addition, the ISP98 was designed to complement the Convention.[526]

At the same time, the construction of Article 1.07 of the ISP98 makes an attempt to override any considerations found in the applicable law in favour of the independence principle by stating that an issuer's obligations toward the beneficiary should not be affected by the issuer's rights and obligations toward the applicant under any applicable agreement, practice, *or law*. In fact, some authors remarked that the ISP98, despite originally being a product for the accommodation of US bankers' needs, would seemingly have a more significant effect in jurisdictions outside the USA, in particular for the promulgation of the autonomy principle.[527]

3.2.3.2.3. The Uniform Rules for Demand Guarantees 758 (the URDG)

Whilst stand-by letters of credit are effectively performing the same or at least very similar legal functions as demand guarantees, there are several important differences between the two instruments in the commercial sense, hence the ICC's logic of introducing two different sets of rules.[528]

The URDG was introduced in 1992 with the aim of superseding the Uniform Rules for Contract Guarantees 1978 (the URCG), which did not find much support from the industry,[529] and codifying independent guarantees practice.[530] The next revision of the URDG (URDG 758) took place in 2010 and has further achieved uniformity in the realm of documentary instruments by aligning its terminology with those used in UCP 600.[531] In fact, one of the main tasks of the ICC draft group was to use similar vocabulary with the UCP to conform to the same concepts and standards.[532]

The URDG has also become a model for independent guarantee statutes in several jurisdictions[533] as well as being adopted by the World Bank and the International Federation of Consulting Engineers (the FIDIC) in their model contracts.[534] In addition, similar to letters of

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[526] Gerold Herrmann, United Nations Commission on International Trade Law, 'Report of the Secretary-General on International Standby Practices (ISP98)' (Annex III A/CN.9/477 Volume 31 Yearbook 2002) 582.

[527] Jim Barnes, 'ISP98 Standard Forms and Achieving Independence' (2013) 19 (1) DCInsight. In this article the author explains that in the USA there has been very little problem in recognising the independence principle of documentary instruments as opposed to jurisdictions elsewhere.

[528] See Goode, 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (n 55) 730-731; Kim Sindberg, 'Guarantees Versus Standby Letters of Credit' (2012) 18 (1) DCInsight. In particular, when comparing both, Sindberg reaches the conclusion that standby letters of credit are more sophisticated and advantageous instruments.

[529] See Christoph Martin Radtke, 'The URDG Revision: a CLP Member's View' (2009) 15 (2) DCInsight; Kelly-Louw (n 40) 19. However, the URCG are still being used in certain sectors today.

[530] Georges Affaki and Roy Goode, *Guide to ICC Uniform Rules for Demand Guarantees URDG 758* (ICC Publication No. 702 2011) i.

[531] See Roy Goode, 'ICC approves revised rules on demand guarantees' (2010) 16 (1) DCInsight.

[532] See the interview of Georges Affaki in 'The Insight Interview: Georges Affaki' (2008) 14 (3) DCInsight (hereinafter referred to as 'the interview of Georges Affaki No. 1').

[533] For example, the Uniform Act Organizing Securities as adopted by the 16 African states belonging to the Organization for the Harmonization of Business Law in Africa, see Kelly-Louw (n 40) 22; Georges Affaki, 'URDG 758: the Balance Sheet After Two Years" (2012) 18 (4) DCInsight. See also comments of Georges Affaki in his interview in 'On Revising the Uniform Rules for Demand Guarantees' (2007) 13 (1) DCInsight (hereinafter referred to as 'the interview of Georges Affaki No. 2')

[534] See comments of Georges Affaki in the interview of Georges Affaki No. 2 (n 533) and in 'The new URDG 758: one year on' (2011) 17 (4) DCInsight.

credit practice, the worldwide usage of demand guarantees has resulted in certain differences in the URDG interpretation and application by trade finance actors. Consequently, there have been calls for the ICC to introduce an international standard demand guarantee practice compilation,[535] similar to the ISBP for letters of credit (see below), in order to promote greater uniformity in the practice of demand guarantees. Whilst the ICC is likely to develop the International Standard Demand Guarantees Practice (the ISDGP) at some stage in the future, there is a wide consensus that such publication would be premature at present.[536]

In comparison to other ICC Uniform Rules, the URDG is developing the most ties with national law and jurisdiction. It was noted that the provisions of the URDG as to governing law and jurisdiction represent something of a departure from the approach taken by the ICC in the design of the rules for other documentary instruments.[537] In particular, Article 34(a) of the URDG specifically provides that the governing law of a demand guarantee shall be the law of the place of the issuer, unless otherwise provided for in the guarantee. Whilst the mandatory provisions of national law will prevail, there is unlikely to be any conflict with the URDG because in many countries there is no or only limited statutory law providing for regulation of demand guarantees.[538] In fact, the ICC emphasises that co-existence between national law and the URDG is a matter of necessity and that the URDG needs to be supplemented by national law.[539]

At the same time, having specified the rule regarding the applicable law to demand guarantees, Article 34(b) of the URDG 758 has created some confusion whereby one instrument covering the same transaction is subject to two different laws and jurisdictions (issuer and confirmer) in the case of counter-guarantees.[540] It seems that on this point the drafters decided to take a similar approach to the treatment of letters of credit by common law courts, *i.e.* by viewing certain parts of the transaction as separate contracts which may be governed by different laws. As noted by experts, this may not be attractive to banks and therefore they may turn to the use of stand-by letters of credit instead.[541] Moreover, even the Chair of the URDG Drafting Group, Dr Georges Affaki, commented that counter-guarantees are damaging to the instrument, mainly because they increase legal uncertainty due to being subject to other applicable law.[542] In this context, having a single body of law to regulate the functioning of the instrument would be beneficial for the practice and use of demand guarantees. As suggested in this chapter, *lex*

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[535] See also the definition of complying presentation in Article 2 of the URDG 758: complying presentation under a guarantee means a presentation that is in accordance with, first, the terms and conditions of that guarantee, second, these rules so far as consistent with those terms and conditions and, third, in the absence of a relevant provision in the guarantee or these rules, *international standard demand guarantee practice*.

[536] Affaki (n 533).

[537] Goode, 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (n 55) 727.

[538] Pavel Andrle, 'URDG 758: Work in Progress' (2010) 16 (4) DCInsight.

[539] Affaki and Goode (n 530) 38, 409.

[540] ibid 407; Sindberg (n 528).

[541] See Sindberg (n 528); Ellinger and Neo (n 388) 349. See also comments of Staughton LJ in *Wahda Bank v Arab Bank plc* [1996] C.L.C. 408 at 413.

[542] Georges Affaki, 'Cleaning Counter-Undertakings: Another View' (2013) 19 (4) DCInsight.

documentaria commercium is capable of becoming such a body. However, the rule of Article 34 in its current form clearly promotes national law as the default option in the event of the absence of any stipulation of the choice of law. Therefore, in the current state of affairs the development of *lex documentaria commercium* is extensively limited in the context of demand guarantees. The approach taken by the drafters of the URDG looks rather odd when compared to the approach in drafting other sets of uniform rules and does not promote non-state regulation.

Moreover, Article 35 of the URDG 758 expressly provides encouragement to the parties to resolve their disputes via litigation by referring to the competent court of the country of the location of the guarantee issuer or, in case of the counter-guarantee, of the location of the counter-guarantor. Whilst it is possible to incorporate a dispute resolution clause in a demand guarantee, the parties seldom do this, so the provision of Article 35 will likely function as a default rule in many instances.[543] This limits parties' choices to explore any other dispute resolution solutions, which can and is likely to be more effective than court litigation in matters concerning documentary instruments.[544] In particular, Article 35 of the URDG 758 has possibly been the reason why the practice of incorporation of a DOCDEX clause in documentary instruments has firstly appeared in relation to demand guarantees.[545]

3.2.3.2.4. The Uniform Rules for Collections (the URC 522)

A documentary collection is a transaction where the exporter entrusts the collection of a payment to the remitting bank (exporter's bank) which delivers the corresponding documents to the collecting bank (importer's bank) along with the instructions for payment. The collection arrangement procedure is riskier for the exporter, although its terms are more convenient and cheaper for the importer than a letter of credit.[546]

The URC was developed in order to facilitate the processing of documentary collection by banks, to eliminate difficulties with the interpretation of rights and obligations of the persons involved in the collection and to avoid misunderstandings.[547] The latest version is the URC 522 which came into force in 1996.

As in the case of the UCP, there are claims that the URC is so commonly used among banks that it should be apply irrespective of whether parties have incorporated it.[548] For example, in *Harlow & Jones Ltd v American Express Bank Ltd and Creditanstalt-Bankverein (Third*

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[543] Affaki and Goode (n 530) 411-413.

[544] Chang-Soon Song, 'Sectoral Dispute Resolution in International Banking (Documentary Credit Dispute Expertise: DOCDEX)' (2013) 30 (3) Arizona Journal of International & Comparative Law 529, 551.

[545] Kim Sindberg, 'LC Disputes – Is DOCDEX the Answer?' (*LCViews*, [no date]) <http://www.lcviews.com/index.php?page_id=43> accessed 20 September 2019.

[546] Rajdeep Goswami, 'Collection Arrangement: An Analysis' (2012) National Law University Centre of Competition Law.

[547] Oliver Wieck, 'Securing commercial transactions based on international ICC standards' in Andreas Klasen and Fiona Bannert (eds), *The Future of Foreign Trade Support: Setting Global Standards for Export Credit and Political Risk Insurance* (Global Policy 2015).

[548] Adodo (n 397) 91.

Party)[549] Gatehouse J noted that no express incorporation of the URC is required because all English banks are subscribers to the URC. This, however, should not be extended to relations between a bank and its customer.[550]

With effect on and from 1 July 2019 the ICC enhanced the URC 522 by releasing the Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation Version 1.0, known as the eURC. The primary reason behind the development of the eURC was to address the trend whereby trade finance instruments have moved towards a mixed ecosystem of paper and digital, and, ultimately, electronic records alone.[551] Thus, similarly to the eUCP (see section 3.2.3.2.1 above), the aim of the eURC is to advance traditional trade solutions in a digital environment, including the provision of uniformity, consistency and standardisation in customs and practice, and "conformity and congruence as opposed to divergent local, national and regional practice".[552]

The mode of application of eURC is similar to the one of the eUCP.[553] In particular, the eURC collection instruction is also subject to the URC without express incorporation of the URC.[554] At the same time, where the eURC applies, its provisions prevail if they would produce a result different from the application of the URC.[555]

3.2.3.2.5. The Uniform Rules for Bank Payment Obligations (the URBPO 750)

In 2011 the ICC and the Society for Worldwide Interbank Financial Telecommunication (SWIFT) decided to join efforts in order to achieve an ambitious goal to design an innovative way for trading counter-parties to secure and finance their open account trade transactions via their banking partners.[556] Thus, a bank payment obligation (BPO) was developed, which is an irrevocable undertaking given by the buyer's bank to the seller's bank that payment will be made on a specified date after a specified event has taken place.[557] This instrument has been described as the most exciting and revolutionary innovation in trade finance,[558] and a separate set of rules has been designed by the ICC, namely the URBPO 750.

Sometimes BPOs are mistakenly confused with electronic letters of credit.[559] Whilst this is

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[549] [1990] 2 Lloyd's Rep 343.

[550] See a Singaporean case of *AA Valibhoy Valibhoy & Sons (1907) Pte Ltd v Banque Nationale de Paris* [1994] 2 SLR 772, 781-782 as reported in Adodo (n 397) 91.

[551] Meynell, *Commentary on eUCP Version 2.0 eURC Version 1.0: Article-by-Article Analysis* (n 503) 15.

[552] ibid.

[553] In fact, these two sets of uniform rules were developed simultaneously, hence their close resemblance.

[554] See Article e3 of the eURC.

[555] See Article e3 of the eURC.

[556] André Casterman, 'The BPO Rules on the Way to Adoption' (2013) 19 (1) DCInsight.

[557] André Casterman, 'BPO Update' (2012) 18 (3) DCInsight.

[558] ibid; Merlin Dowse, 'Don't Wait for Your Customers to Ask about the BPO' (2013) 19 (2) DCInsight.

[559] David Williams, 'UK: Bank Payment Obligations And The URBPO – An Update' (*Mondaq*, 2015) <http://www.mondaq.com/uk/x/409470/Financial+Services/Bank+Payment+Obligations+And+The+URBPO+An+Update> accessed 20 September 2019. In fact, the instrument occupies the middle ground between traditional letters of credit and open account trade, see Dowse (n 558); 'What is a Bank Payment Obligation (BPO)?' (*Trade Finance Global*, [no date]) <https://www.tradefinanceglobal.com/finance-products/bank-payment-obligation-bpo-urbpo/> accessed 20 September 2019.

certainly wrong, BPOs are functioning on the basis of the same key principles with the difference being that under a BPO banks deal with data only (not with documents only as is the case with letters of credit).[560] In addition, a BPO is not likely to be in conflict with a letter of credit: the latter will be used for securing a trade transaction when the level of trust is low or zero, whereas a BPO is likely to step in as soon as trading parties have more confidence in their relationship.[561]

As a trade finance instrument, the BPO demonstrates how bank-led innovation can be delivered efficiently at industry level through the collaboration of banks, the ICC and SWIFT.[562] However, the downside of the functioning of the BPO is that in order to service the instrument efficiently, a minimum technology investment for the bank to operate a low volume of BPO transactions is between 10,000 and 27,000 euros, *i.e.* only large banks are likely to take on these costs willingly.[563] Additionally, since the instrument is relatively new, it remains to be seen how courts in certain jurisdictions will treat BPOs.[564]

3.2.3.2.6. The International Standard Banking Practice (ISBP 745)

The development of the ISBP arose because of the need to eliminate any ambiguity in and standardise interpretation of the UCP's provisions, in particular with regard to the acceptability and correctness of presentation under letters of credit.[565] The need for the ICC's clarification of international standard practices for the examination of presented documents has become even more apparent following the introduction of Article 13(a) in the UCP 500, which provided that compliance of the documents on their face with the terms and conditions of the credit, shall be determined by international standard banking practice. The newly introduced concept of international standard banking practice resulted in considerable discussion regarding its exact meaning as it was not defined in the UCP 500 or any other ICC documents. In particular, it was universally accepted that standard banking practices regarding examination of the documents under a letter of credit were too elusive to be exhaustively identified in the UCP in the light of a great variety of regional nuances in such practices.[566] Consequently, it resulted in a situation whereby various banks, relying on the international standard banking practice, had different approaches regarding the acceptability of similar documents.[567]

In consequence, a vigorous campaign was launched by the trade finance community for the

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[560] Williams (n 559).

[561] André Casterman, 'The Future of the Bank Payment Obligation (BPO)' (2013) 19 (3) DCInsight; 'The Bank Payment Obligation – Looking Ahead' (*Institute of International Banking Law & Practice,* 12 March 2018) <https://iiblp.org/the-bank-payment-obligation/> accessed 20 September 2019.

[562] Casterman, 'The BPO Rules on the Way to Adoption' (n 556).

[563] Casterman, 'The Future of the Bank Payment Obligation (BPO)' (n 561).

[564] Williams (n 559).

[565] Ellinger and Neo (n 388) 32, 53; Kelly-Louw (n 40) 30.

[566] Adodo (n 397) 126. At the same time, if courts consider the ICC Opinion to be incorrect, nothing stops them to depart from it.

[567] Kelly-Louw (n 40) 30.

ICC to produce guidance on such international banking practice,[568] which eventually resulted, albeit belatedly, in the adoption of the ISBP in 2003. Naturally, when the ISBP was published, it attracted conflicting opinions as to the effectiveness of the publication: whilst some commentators have proclaimed that it was a solution to all the problems experienced with the non-harmonised standard for the examination of presented documents, others have stated that this publication could only intensify and enhance the confusion surrounding the UCP 500 and the ICC's subsequent policy statements.[569] However, in the 16 years since the introduction of the ISBP it has become clear that it has received complete support from the actors involved in trade finance and, whilst not required to be expressly incorporated into a letter of credit, has evolved into a necessary companion of the UCP 600.[570] Ronai, for example, argues that today every banker involved in documentary credits needs to have both UCP 600 and ISBP 745 on his/her desk.[571] At the same time, it is considered as being unacceptable to justify a refusal of presentation solely on the basis of the ISBP: the ISBP paragraph may be referenced as a supporting source, but not as a primary reason for an actual refusal, which should always be on the basis of the provisions of a certain set of rules for documentary instruments.[572] However, whilst the ISBP is technically not a set of ICC documentary instruments rules, exactly the same procedure is in place for the ISBP and approval of its revisions by the ICC.[573] Therefore, the ICC officials have proclaimed that the ISBP has the same kind of weight, at least for the ICC Banking Commission.[574]

It is important to note that the term "international standard banking practice" as incorporated in the UCP 600 encompasses more than can be found in the ISBP, and thus cannot be viewed as an ultimate statement of banking practice universally applicable to documentary credits.[575] Moreover, the ISBP, whilst attempting to deal with the practices for examination of the documents most often presented under documentary credits, cannot encompass and deal with all the documents that might be called for in documentary credits.[576] Therefore, the ISBP, whilst being a codified compilation of practices, constitutes only a portion of international standard banking practice, which, in addition to any uncodified practices that are difficult to establish and prove, also includes, for example, ICC Opinions and DOCDEX Decisions[577] (see sections 3.2.3.2.7 and 3.2.3.2.8 below).

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[568] Adodo (n 397) 127; Bob Ronai, 'Where to now for the ISBP?' (2013) 19 (4) DCInsight.
[569] Kelly-Louw (n 40) 31-32.
[570] ibid.
[571] Ronai (n 568). In fact, he goes even further to state that every applicant and beneficiary needs to have access to the same to the UCP 600 and ISBP745.
[572] See the interview of Gary Collyer in 'Issues in the upcoming revised ISBP' (2012) 18 (4) DCInsight (hereinafter referred to as 'the interview of Gary Collyer').
[573] ibid.
[574] ibid.
[575] Kelly-Louw (n 40) 32; 'ISBP 681 Approved Unanimously' (2007) DCInsight Vol. 13 No.3 July - September 2007.
[576] Kelly-Louw (n 40) 30-31. In fact, as Kelly-Louw argues, the initial purpose of the ISBP was to explain how practices set out in the UCP 500 were to be applied by documentary practitioners and its drafting was not based on an extensive study of existing practice.
[577] See the interview of Gary Collyer (n 572).

The ISBP has proven to be a valuable aid to trade finance practitioners (primarily those, who are involved in dealing with documentary credits, but also stand-by letters of credit and demand guarantees):[578] according to some anecdotal evidence, rejection rates have dropped due to the application of the practices detailed in the ISBP.[579] At the same time, the ISBP cannot remain static in a changing trade environment.[580] In fact, since its introduction in 2003 the ISBP has been revised and updated in 2007 and 2013, *i.e.* at a rate more promptly than any other ICC rules. Moreover, there have been calls to expand the scope of the ISBP to include practices from related areas, such as insurance and shipping, as a banker often deals with and examines insurance and transport documents.[581]

The importance and authority of the ISBP as a source of documentary instruments practice would likely have a significant bearing when an issue of a certain banking practice is litigated[582] and there have been precedents for such treatment by courts, when the ISBP was allocated a decisive role in determining the outcome of a dispute.[583] In fact, it has been described as "representing the collective and approved wisdom of the ICC Banking Commission as to matters of standard practice amongst international banks in the use and operation of letters of credit incorporating UCP 600".[584]

3.2.3.2.7. The ICC Banking Commission Opinions (the ICC Opinions)

Naturally, upon the application of the ICC rules by actors involved in international trade finance, the need to interpret or clarify certain aspects of particular provisions of these rules has occurred. Therefore, the ICC Banking Commission adopted the practice of advising industry practitioners of the correct application and meaning of its uniform rules via its opinions.[585] In addition, these opinions also ensure that the practical application of the ICC rules is consistent and harmonised throughout the world[586] and can prevent the development of disputes that would otherwise lead to court action.[587]

To date the ICC Banking Commission has issued nearly 900 Opinions in response to the

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[578] Kelly-Louw (n 40) 32.

[579] ibid.

[580] Sheilar Shaffer, 'ISBP and INCOTERMS are Relevant to Each Other' (2006) 12 (3) DCInsight.

[581] See, for example Kim Sindberg, 'ISBP Must Take Account of Other Sectors' (2013) 19 (1) DCInsight; in addition, the ICC stated that in the long-term perspective it may consider widening the scope of the ISBP to include practices relating to the use of the eUCP, see Meynell, *Commentary on eUCP Version 2.0 eURC Version 1.0: Article-by-Article Analysis* (n 503) 15.

[582] Ellinger and Neo (n 388) 32-33.

[583] See, for example, *Credit Industriel et Commercial v China Merchant Bank* [2002] EWHC 973 and *Deutsche Bank AG, London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm).

[584] See Justice Andrew Baker in *Deutsche Bank AG, London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm) at 14.

[585] ICC, 'Opinions of the ICC Banking Commission' (*ICC*, [no date]) <https://library.iccwbo.org/tfb/tfb-iccopinions.htm> accessed 20 September 2019.

[586] Kelly-Louw (n 40) 11; Goode, 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (n 55) 742.

[587] ICC, 'Opinions of the ICC Banking Commission' (n 585). Although it should be noted that the ICC Banking Commission will not consider any inquires which could be or that are the subject of court action, see 'ICC Banking Commission Guidelines For Dealing With Queries That Could Be The Subject Of Court Action' (*ICC*, 16-17 May 2001) <https://cdn.iccwbo.org/content/uploads/sites/3/2001/05/ICC-Banking-Commission-guidelines-for-dealing-with-queries-that-could-be-the-subject-of-court-action.pdf> accessed 20 September 2019.

inquiries of industry actors, such as bankers, freight forwarders, exporters and importers. Thus, through issuing such Opinions the ICC Banking Commission has acquired an interpretive function in addition to its rule-making function.[588]

It is worth noting that, according to the drafters of the ISBP, over 80% of the ISBP is built upon principles that had been discussed and agreed in the ICC Opinions.[589] Accordingly, the ICC Opinions play an important role in the establishment and dissemination of international standard banking practices.[590]

Whilst not being binding on judges, it has been long accepted, at least by English and American courts, that the ICC Opinions carry considerable weight and provide a useful tool in the application and interpretation of the ICC-developed rules for documentary instruments.[591] In fact, such practice by courts to rely on the ICC Opinions has led several academics to conclude that these Opinions have transformed from soft law to legal rules of decision-making.[592]

The process for referring to the ICC Banking Commission's Opinion is described in detail in ICC Official Opinion Handling: Procedure and Terms of Reference.[593] In particular, it is worth noting that a request for an Opinion should strictly comply with the requirements as to its form (*e.g.*, of a maximum of two A4 pages, in arial font, size 12), content (*e.g.*, actual issues or transactions and not hypothetical situations) and timeline (*e.g.*, no later than 10 weeks prior to the relevant Banking Commission meeting). These limitations also seem to restrict the practical relevance of the Opinions, which has resulted in some of them being a somewhat vague analysis.[594] Consequently, such limitations had led the ICC to develop a full-scale specialised dispute resolution service.

3.2.3.2.8. Documentary Instruments Dispute Resolution Expertise (DOCDEX)

DOCDEX and its Decisions represent an important development by the ICC, which ensures the liveliness of *lex documentaria commercium* and its practical application. As has been noted by Levit, in contrast to the advisory nature of the ICC Opinions, DOCDEX operates with live disputes and, in essence, gives the ICC Banking Commission a mandate to act as a dispute resolution authority.[595] Collyer explains the difference between DOCDEX Decisions and ICC Opinions by the fact that the former has a greater scope for a more considered judgment based

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[588] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1174.

[589] See the interview of Gary Collyer (n 572); the interview of René Müller in 'Comments on the most recent draft ISBP' (2013) 19 (1) DCInsight; the interview of Carlo DiNinni in 'The issues in the revised ISBP' (2013) 19 (2) DCInsight.

[590] See the interview of Gary Collyer (n 572); the interview of René Müller (n 589); the interview of Carlo DiNinni (n 589).

[591] Adodo (n 397) 126; Kelly-Louw (n 40) 11; Jingbo Zhang, 'Document Examination and Rejection Under UCP 600' (PhD Thesis, University of Southampton 2015) 25-26; *ICC Official Opinion Handling: Procedure and Terms of Reference* (Document No. 470/1220rev) 1; see, for example, *Deutsche Bank AG, London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm)

[592] Manganaro (n 39) 289; Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 141-142.

[593] *ICC Official Opinion Handling* (n 591); see also a succinct summary of the process by Justice Andrew Baker in *Deutsche Bank AG, London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm) at 14.

[594] See Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1175; Kim Christensen, 'The Reasoning Behind Recent ICC Opinions' (2009) 15 (4) DCInsight.

[595] Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 139; Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1176.

on supporting evidence, whereas the latter is just a snapshot of a given set of facts which are not based on the submission of any supplementary documents.[596] At the same time, the key similarity of the ICC Opinions and DOCDEX Decisions is that both are considered as sources of international standard banking practice.[597] In fact, DOCDEX Decisions not only interpret existing but also create new practices. Thus, for the purposes of determination as to whether the DOCDEX dispute resolution service has relevant features to be considered as the primary forum for *lex documentaria commercium* application and development, this will be analysed in detail in Chapter 5.

The sources listed above clearly illustrate the high level of sophistication of *lex documentaria commercium*: the variety of available sources (from an international convention to a compilation of trade finance practices) and their distinct functional purpose (from general rules to advisory opinions, from recommendations to dispute resolution decisions) result in the formation and sustaining of a unique and comprehensive self-regulatory regime in the area of trade finance. Moreover, due to the predominantly private and market-oriented nature of these sources, they can be effectively changed and updated if business logic or market forces so require, which is a distinct characteristic of *lex mercatoria*.[598] This is particularly striking when compared with attempts to inflict state regulation over trade finance activities and thus overrule long-established self-regulatory functioning. In fact, any such attempts usually result in a vast array of problems, especially in dispute resolution, where the issue of the governing law of documentary instruments becomes central to a dispute. The following sections discuss such problems and argue for the need to consider *lex documentaria commercium* as the default regime under which documentary instruments are functioning.

3.3. The problematic issue of governing law in documentary instruments

The need to carefully consider, agree on and specify the governing law of a transaction is often emphasised as prudent practice for parties involved in international trade.[599] However, such practice is absent when dealing with documentary instruments, and usually there are no provisions regarding the governing law of a documentary instrument.[600] Frequently this is because of the inherent nature of documentary transactions and the potential number of parties involved in it, who are likely to be from different jurisdictions, which would make it very

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[596] See Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 1997-2003* (ICC Publication No. 665 2003) 3

[597] See the interview of Gary Collyer (n 572).

[598] Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 986-987; La Spada (n 69); Goldman (n 69) 114.

[599] Oliver Smith, 'Letters of Credit' (*Fieldfisher*, 27 February 2014) <https://www.fieldfisher.com/publications/2014/02/letters-of-credit> accessed 20 September 2019; Tim Walker, 'Trade Finance – Governing Law of a Letter of Credit' (*Harrison Clark Rickerbys*, 13 January 2014) <https://international.hcrlaw.com/articles/trade-finance-governing-law-letter-credit/> accessed 20 September 2019.

[600] Anthea Markstein, 'The Law Governing Letters of Credit' (2010) 16 Auckland University Law Review 138; Brian Davenport and Michael Smith, 'The Governing Law of Letters of Credit Transactions' (1994) Butterworths Journal of International Banking and Financial Law 3; Denis Petkovic, 'The Proper Law of Letters of Credit' (1995) 4 Journal of International Banking Law 141; Jason Chuah, 'Letter of Credit -- Applicable Law and Forum Non Conveniens' (2004) 10 (3) The Journal of International Maritime Law 236, 239; Caprioli (n 471) 911.

difficult to agree on the applicable law.[601]

In such cases of absence of any reference to a governing law the courts have ordinarily proceeded to the search for the system of law (importantly, not to a particular country)[602] with which the relevant contract has the closest and most real connection.[603] However, this is not an easy task. The difficulties for courts to identify a proper law governing a letter of credit transaction has been known since nearly a century ago,[604] and such difficulties continue to exist today.[605]

Moreover, different legal systems may have different approaches in determining the governing law, which are predominantly made on the basis of contract law provisions via identifying either the place of conclusion of a contract or the place of its performance.[606] This might be the issuing bank's location, the confirming bank's location or the beneficiary's location. Thus, the location (jurisdiction) of one of these parties is of significant effect because it is feasible that different rules would then apply at various stages of the same transaction as well as towards general contractual aspects, such as non-performance liability, limitation periods, force majeure.[607] As a consequence, it has resulted in a situation where courts have reached different outcomes in similar types of legal issues.[608] Of course, it is appropriately questioned whether this situation and general diversity of legal rules applicable to a single letter of credit transaction can be deemed as being satisfactory for promoting reliability and legal certainty, including coping with disputes arising out of documentary instruments.[609]

Currently, the position of common law countries is to view relationships covered by a documentary instrument individually, and thus to determine which law is applicable to each of these individual relationships.[610] The starting point is that the governing law of a contract is determined at the time of contracting. However, as discussed above, the parties rarely specify the governing law of documentary instruments, thus leaving courts with the difficult task of identifying the law with the closest connection. Such a connection is usually determined by identifying the place of performance under the contract. At the same time, the nature of documentary instruments is such that the place of performance may not be known at the time of contracting and may be switched in the course of a transaction depending on its type and the conduct of the parties involved. The most illustrative example of such a situation is that the place of performance/payment under a letter of credit, and thus the governing law, may be

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[601] Adodo (n 397) 272.
[602] See *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* [1983] 1 W.L.R. 228 at 241. Simapungula (n 39) 494.
[603] Nicholas Creed, 'The Governing Law of Letter of Credit Transactions' (2001) 16 (2) Journal of International Banking Law 41, 43.
[604] Trimble (n 20) 981.
[605] Markstein (n 600) 163.
[606] Adodo (n 397) 271-272; Caprioli (n 471).
[607] Adodo (n 397) 270.
[608] Warnasuriya (n 388) 90-91.
[609] Khademan (n 163) 2-3.
[610] Ellinger and Neo (n 388) 397-398.

changed from that initially apprehended if a nominated bank decides to add its confirmation to the letter of credit (which it is by no means obliged to do) or decides not to act on its nomination.[611]

This was the issue before Cresswell J in *Bank of Credit and Commerce Hong Kong Ltd (in liq.) v. Sonali Bank*.[612] In this case Cresswell J adhered to the notion earlier expressed by Ackner J in *Offshore International SA v Banco Central SA*[613] that great inconvenience would arise if the issuing bank's law applied to all contractual relationships in a letter of credit, including the relations between the confirming bank and the beneficiary. Thus, Cresswell J stated that if the law of the issuing bank was to be considered as the proper law of a letter of credit, the confirming bank would constantly be seeking to apply a whole variety of foreign laws.[614] Therefore, he decided that the governing law of the transaction should be the law of the confirming bank.[615] In practice this means that the confirming bank's right to be reimbursed by the issuing bank cannot be blocked by the respective laws of the issuing bank.[616] However, under such approach the issuing bank would be faced with a similar problem: due to the application of foreign law (the confirming bank's law) it would be obliged to reimburse the confirming bank, but had no means to indemnify itself against any claims from its customer (on the application of whom the respective letter of credit was opened and the relations with whom are governed by the issuing bank's law) from whose account such reimbursement had been made.[617]

It is often suggested in academic literature that in order to escape such a problem the issuing banks should specify the governing law in a letter of credit.[618] However, there are at least two considerations which undermine such an approach. Firstly, advising banks would likely be reluctant to give their confirmation for a letter of credit which was governed by a foreign law. Secondly, the relevant field in 40E ('Applicable Rules') of MT700 SWIFT message[619] is usually allocated for specification as to whether the UCP, eUCP or ISP is applicable.[620] If the issuing bank specifies that the applicable law is the law of its jurisdiction, it may complicate the processing of a letter of credit, because, as discussed below in section 3.5, national laws do not provide detailed regulation of letter of credit transactions. Similarly, if the issuing bank specifies that both the UCP and the law of its jurisdiction apply to a letter of credit, it may lead

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[611] See Article 12 of the UCP.
[612] [1995] 1 Lloyd's Rep. 227.
[613] [1976] 2 Lloyd's Rep (QB) 402 at 404.
[614] *Bank of Credit and Commerce Hong Kong Ltd (in liq.) v. Sonali Bank* [1995] 1 Lloyd's Rep. 227 at 237.
[615] A similar finding has been applied in relation to demand guarantees, see *Turkiye Is Bankasi AS v. Bank of China* [1993] 1 Lloyd's Rep. 132 and *Wahda Bank Plc v. Arab Bank Plc* [1994] 3 Bank L.R. 70.
[616] Creed (n 603) 44.
[617] ibid.
[618] ibid; Petkovic (n 600) 145.
[619] The customary manner of issuing a letter of credit nowadays is by sending an MT700 SWIFT message, see Collyer (n 432) 3. In fact, the use of SWIFT messages has increased harmonisation in the use of documentary instruments, which has led to greater uniformity than in any previous era, see Ellinger and Neo (n 388) 18.
[620] Collyer (n 432) 212; Nisha Koshal, *Understanding Letter of Credit: Learner's Guide to Letter of Credit* (Notion Press 2017) 24.

to substantial inconsistencies in application as well as uncertainties as to which one should have priority, *i.e.* specific regulation of the UCP or general provisions of applicable law.

At the same time, when a bank decides not to confirm, but merely to advise a letter of credit, *i.e.* performing the functions of an advising bank,[621] such switch of the governing law should not occur. This is because the role of an advising bank is simply to inform the beneficiary about the terms and conditions of a letter of credit, and not to perform any checks of the documents presented or make any payments to the beneficiary.[622]

However, courts, in particular those in England, have often confused the functions of advising and confirming banks. This is illustrative of poor knowledge by the judiciary of key and the most simple categories of the functioning of documentary instruments.[623] Reverting to the judgment of Ackner J in *Offshore International SA v Banco Central SA,*[624] he applied the concept of the place of performance in order to determine the law applicable to a letter of credit which was issued by a Spanish bank and advised to the beneficiary by a bank based in New York. Even though, according to the facts of the case, the New York bank did not confirm, but just advised the credit, Ackner J held that the law of New York should be the governing law. He reached this decision because the credit was *opened* via a New York bank (which was not the case, as the credit was *advised* by a New York bank) and the payment was made in US dollars against documents presented in New York.[625] Clearly, Ackner J was avoiding the situation whereby the law governing the contract between the issuing bank and the confirming bank differed from the law governing the relationship between the confirming bank and the beneficiary.[626] However, the problem was that the judge failed to identify the correct role of the bank (not confirming, but advising), and had therefore assumed incorrectly the obligations and responsibilities of such bank. The Spanish bank in *Offshore International SA v Banco Central SA* found itself obliged to pay to the beneficiary under the foreign law, whereas the advising bank had no obligation to pay anything, but enjoyed the benefits of the whole transaction being governed under its law.[627]

In *Power Curber International Ltd v National Bank of Kuwait SAK*[628] the judges applied *Offshore International SA v Banco Central SA* to determine that the governing law of a letter of credit should be the law at the place of performance. At the same time, from the facts of the

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[621] See Article 9 of the UCP 600.

[622] Lijuan Zhou, 'Legal Position Between Advising Bank and Confirming Bank: Contrast and Comparison' (2002) 17(7) Journal of International Banking Law 225.

[623] Creed (n 603) 44.

[624] [1976] 2 Lloyd's Rep (QB) 402.

[625] ibid.

[626] Markstein (n 600) 145.

[627] Notably, in Singapore, another common law jurisdiction, judges are more attentive in their investigation of the banks' roles in documentary credit transactions and have correctly ruled that advising banks merely act as a channel between the issuing bank and the beneficiary to transfer documents, thus not accepting any undertaking to pay under the credit, see *Kredietbank NV v Sinotani Pacific Pte. Ltd. (Agricultural Bank of China, Third Party)* [1999] 3 SLR 288. See also Markstein (n 600) 143.

[628] [1981] 1 W.L.R. 1233.

case one cannot be certain about the exact role of the correspondent bank in the transaction, *i.e.* merely advising or confirming.[629] Nevertheless, Lord Denning pronounced the following stance which defined the overall position of English law in matters concerning the governing law of letters of credit as well as, to some extent, their special nature:

> "A debt under a letter of credit is different from ordinary debts. They may be situate where the debtor is resident. But a debt under a letter of credit is situate in the place where it is in fact payable against documents".[630]

In practice, this meant that the governing law of a letter of credit is the law of the confirming bank, or the law of the nominated bank if it has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank.[631]

Power Curber was relied upon in a number of subsequent cases in England[632] and had a significant effect in other common law jurisdictions, such as Singapore, Australia, Malaysia, New Zealand and Canada[633] as well as in the USA.[634] Academics noted that any derogation of this rule, *i.e.* the governing law of a letter of credit is the situs of presentation of documents, must require an incontrovertible ground.[635] Moreover, the rule had not been amended or repealed following the coming into force of the Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention) and its adoption in the Contracts (Applicable Law) Act 1990. In particular, contrary to the comments of some academics,[636] Articles 4(2) and 4(5) of the Rome Convention (Applicable law in the absence of choice) were interpreted in line with *Power Curber,*[637] thus ensuring that the outcome reached is the same as would have been reached under common law rules.[638] Furthermore, the official guidance on the application of

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[629] See, for example, H.C. Gutteridge and Maurice Megrah, *The Law of Bankers' Commercial Credits* (7th edn, Europa Publications 1984) 244 and Jack Raymond, *Documentary Credits* (2nd edn, Butterworth & Co 1993) 297.

[630] *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 W.L.R. 1233 at 1240.

[631] Similarly, in *Attock Cement Co. Ltd. v Romanian Bank for Foreign Trade* [1989] 1 W.L.R. 1147 it was held that the place of payment is the governing law of a performance bond (demand guarantee). Notably, Staughton LJ recognised the distinction between ordinary guarantees and performance bonds (demand guarantees) by stating that "a guarantee is often intended to be governed by the same law as the principal obligation, but it is of the essence of performance bonds and letters of credit that they are not, in law, guarantees", see *Attock Cement Co. Ltd. v Romanian Bank for Foreign Trade* [1989] 1 W.L.R. 1147 at 1160. See also *Turkiye Is Bankasi AS v Bank of China* [1993] 1 Lloyd's Rep. 132. It is also worth noting that the term 'performance bond' is synonymous with and is equal to such other terms used in trade finance for similar instruments, *i.e.* 'demand guarantee', 'performance bond', 'first-demand guarantee', 'on-demand guarantee', 'demand bond', 'first-demand bond' and 'on-demand bond'. See Ellinger and Neo (n 388) 301.

[632] See, for example, *Bank of Credit & Commerce Hong Kong Ltd (In Liquidation) v Sonali Bank* [1994] C.L.C. 1171; *National Infrastructure Development Co Ltd v Banco Santander SA.* [2017] EWCA Civ 27. See also *Westpac Banking Corporation v. Commonwealth Steel Co. Ltd* [1983] N.S.W.L.R. 735.

[633] See Lord Clarke's comments in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2018] [2017] UKSC 64 at 38-39.

[634] See George Graham, 'International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway' (2001) 47 Wayne Law Review 201, 222.

[635] Charles Chatterjee, 'The Concept of the Natural Forum and the Governing Law of a Transnational Letter of Credit Contract' (1995) 10 (9) Journal of International Banking Law 407.

[636] Davenport and Smith (n 600) 5.

[637] See *Bank of Baroda v Vysya Bank Ltd* [1994] C.L.C. 41 and *PT Pan Indonesia Bank Limited TBK v Marconi Communications International Limited* [2005] EWCA Civ 422, although the latter case should be interpreted cautiously because the court therein relied on the unfortunate judgment in *Offshore International SA v Banco Central SA* in concluding that the governing law of the advising bank is applicable. See Chuah (n 600) 239; Markstein (n 600) 147-148.

[638] See Lord Potter in *PT Pan Indonesia Bank Limited TBK v Marconi Communications International Limited* [2005] EWCA Civ 422 at 41-44; the correlation between Articles 4(2) and 4(5) was also confirmed by the European Court of Justice in Case C-133/08 *Intercontainer Interfrigo (ICF) SC v Balkenende Oosthuizen BV and MIC Operations BV* [2009] OJ C282/15 at 641.

Rome I Regulation specifically mentions the case of letters of credit as being one of the possible exceptions to the general rule of determination of the governing law under Rome I Regulation.[639]

However, the decision in *Power Curber International Ltd v National Bank of Kuwait SAK* and specifically the position expressed by Lord Denning therein was overruled in 2017 in *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq*.[640] In this judgment the majority of the Supreme Court stated that there was no basis for departing from the ordinary rule that the situs of the debt is where the debtor resides, because such "unreasoned distinctions do the common law, and in particular, commercial law, no favours".[641] Thus, the Supreme Court decided that the governing law of a letter of credit is the law of the issuing bank, not the law of the place where presentation and payment takes place.

The decision in *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* has been severely criticised in many respects, including with regard to the doubtful justification of departure from Lord Denning's position, which, taken together, may result in damaging effects for England's (London's in particular) position as a leading international trade finance centre and thereby negatively affect the ability of British exporters to sell goods overseas.[642] One of the criticisms of the judgment in *Taurus*, is that the Justices failed to give due attention to the provisions of the UCP and thus consider the structure of a letter of credit transaction.[643] Strikingly, by granting a third party debt order the judges effectively allowed a third party with no connection to the transaction to intervene into the relationship between the nominated and issuing banks, thus affecting bank-to-bank reimbursements under a letter of credit, which, in essence, undermines the autonomy principle (see the discussion about the crucial role of the autonomy principle in section 3.2.1.1 above).[644] Moreover, the Supreme Court also did not consider a previous line of judgments on the issue of the governing law in letters of credit as well as the provisions of the Rome I Regulation, even though counsel for the claimants and respondents raised these issues (as is apparent from the video recording of the hearing).[645] Thus, as pointed out by Gwynne, this is a regrettable move, especially given that the judges provided very little justification for their departure from the

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[639] Ministry of Justice, 'Guidance on the law applicable to contractual obligations (Rome I): Outline of the main provisions' (February 2010) 4.

[640] [2017] UKSC 64.

[641] See Lord Neuberger in *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64 at 125.

[642] Richard Gwynne, 'Letters of credit in the Supreme Court: Some unintended consequences?' (*Stephenson Harwood*, 1 November 2017) <https://www.shlegal.com/insights/letters-of-credit-in-the-supreme-court-some-unintended-consequences> accessed 20 September 2019; Richard Gwynne, 'The Governing Law(s) of a Letter of Credit' (2018) 4 Lloyd's Maritime and Commercial Law Quarterly 450, 455-456. Stephen Tricks, 'Bank-to-bank Relationships in Letters of Credit' (2018) 2 Lloyd's Maritime and Commercial Law Quarterly 217, 217-218. In fact, the author here points out that the ICC expressed its concerns about the implications of the Supreme Court's judgment. See also John Tarrant, 'Identifying a Creditor in a Letter of Credit: Who Owns the Debt?' (2018) 4 Journal of International Banking and Financial Law 231.

[643] Tricks (n 642) 219-220; Gwynne, 'Letters of credit in the Supreme Court' (n 642).

[644] Tricks (n 642) 221; Gwynne, 'Letters of credit in the Supreme Court' (n 642).

[645] Gwynne, 'The Governing Law(s) of a Letter of Credit' (n 642) 455.

position which had stood for more than 35 years.[646] In addition, whilst overriding *Power Curber*, the judges did not override *Bank of Baroda v Vysya Bank Ltd* and *PT Pan Indonesia Bank Limited TBK v Marconi Communications International Limited,* thus not clarifying whether positions in these judgments regarding the determination of the applicable law pursuant to the Rome Convention and Rome I Regulation[647] (which is similar to Lord Denning's rule, *i.e.* the applicable rule being the place of performance) has remained in force. Whilst it is largely agreed by most commentators that the task of the judges was difficult due to unusual clauses and the structure of the relevant letter of credit (which, in fact, resulted in the division of the judges' opinions in several respects), same commentators point out the unfortunate outcome of the decision in *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq*, thus recommending that it be treated as a *per incuriam* judgment and/or a decision peculiar to its own facts.[648]

Given the above, the main point to be taken from this chronological overview of English judgments is that it is very difficult to establish the governing law of letters of credit. This is due to a number of relations included in a letter of credit transaction, most of which are short-term and self-liquidating in a commercial sense, but provide real difficulty when trying to classify such relations through legal interpretation.[649] Whilst the functioning of letters of credit has remained the same, the position towards the governing law has changed substantially and has failed to achieve the required clarity. This is a notable illustration that letters of credit are a product of merchants, not lawyers, and any attempts to fit this documentary instrument into standard legal concepts will inevitably face strong theoretical and practical difficulties. From a legal point of view, one of the main difficulties is the fact that from the time of the issuance of a letter of credit its governing law may switch a number of times depending on the actions of the parties involved. For example, such factual circumstances as the addition of confirmation, failure of a nominated bank to act on its nomination, failure of a nominated bank to honour presentation, presentation of the documents not to the nominated, but directly to the issuing bank, availability of a letter of credit with any bank (freely negotiable letters of credit) will take effect on the governing law, if interpreted through legal lenses.

3.4. Approaches to deal with the issue of governing law in documentary instruments

Often legal writers suggest specifying the governing law of a letter of credit at the time of its issuance in order to escape the issue of determination of the governing law.[650] Indeed, in the light of the complications referred to above, it may come as a surprise to the layman that

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[646] ibid.

[647] Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[648] Tricks (n 642) 221; Chee Ho Tham, 'Different Debts for Different Purposes' (2018) 2 Lloyd's Maritime and Commercial Law Quarterly 210, 217; Gwynne, 'The Governing Law(s) of a Letter of Credit' (n 642) 456;

[649] Gwynne, 'The Governing Law(s) of a Letter of Credit' (n 642) 452.

[650] See, for example, Petkovic (n 600) 145; Teoh (n 388) 58.

documentary instruments do not include a clause on the governing law more often.[651] However, any attempts to specify the governing law of a letter of credit by its issuer, *i.e.* the issuing bank, are simply not practical: it is highly unlikely that a nominated or confirming bank would agree to accept certain payment obligations to a beneficiary under foreign law in the knowledge that reimbursement from the issuing bank could be affected by such foreign law. Failure of a nominated bank to agree to honour or negotiate a complying presentation would naturally render the letter of credit framework unworkable. In addition, industry practitioners often view clauses on the choice of governing law as adding to transaction costs and creating obstacles to the expedience of the system.[652]

It is also worth mentioning here that the drafters of the URDG took a somewhat different approach (if compared to other ICC uniform rules, see section 3.2.3.2.3 above) and aimed to tie the governing law of a demand guarantee to the law at the place of its issuance. However, this has caused problems in circumstances of confirmation of a guarantee and the issuance of a counter-guarantee, which results in one instrument covering the same transaction being subject to two different laws and jurisdictions (the issuer's and confirmer's). Many experts, including the drafters of the URDG, noted the damaging effect of such an approach on the promotion of certainty.[653]

Given the above difficulties in determining the governing law in letters of credit (and other documentary instruments), there have been some discussions and suggestions as to how the issue could be resolved. For example, some suggestions have been expressed for the development of wholly new concepts for application when determining the governing law in letters of credit. These concepts include such options as:[654]

i) floating law, whereby the governing law changes depending on the circumstances of a transaction and/or conduct of parties involved, *i.e.* adding confirmation by a confirming bank, failure to pay by a nominated bank, etc.;
ii) subsequent conduct of parties, whereby, similarly to the concept of a floating law, the governing law changes in the course of a transaction, but such change solely depends on the conduct of parties following the issuance of a documentary credit;
iii) fixed law, whereby the governing law of the transaction remains the same irrespective of any circumstances or actions taken by parties involved in a letter of credit transaction;

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[651] Ellinger and Neo (n 388) 398.
[652] ibid.
[653] ibid 349. See Sindberg, 'Guarantees Versus Standby Letters of Credit' (n 528); Affaki, 'Cleaning Counter-Undertakings: Another View' (n 542). See also comments of Staughton LJ in *Wahda Bank v Arab Bank plc* [1996] C.L.C. 408 at 413.
[654] See Markstein (n 600) 153-162. In particular, the possibility of floating choice of law and subsequent conduct has been widely discussed in Singapore, see for example, Tan Yock Lin, 'Good Faith Choice of a Law to Govern a Contract' (2014) Singapore Journal of Legal Studies 307, 325-326; Justice Woo Bih Li and others, 'Report on reform of the law concerning choice of law in contract' (Law Reform Subcommittee Singapore Academy of Law, 2003) 29; Goh Yihan, 'Towards a Consistent Use of Subsequent Conduct in Singapore Contract Law' (2017) 5 Journal of Business Law 387.

iv) conclusion of fresh agreements, whereby each relationship in a letter of credit transaction is treated as a separate agreement and, consequently, may (and likely to) have different governing law.

However, each of the approaches has its own limitations and may not meet the commercial expectations of the parties.[655] Many of the suggested solutions above simply mirror the approaches taken by judges, such as to subject the governing law to the law at the place of issuance (see the judgment in *Taurus*) or at the place of performance (see the judgment in *Power Curber*). It is also easy to see how diverse are the approaches outlined above: from suggestions to fix the governing law or to make it floating. This is illustrative of the uncertainty about the most efficient approach.

Ellinger and Neo summarised such various approaches into the following three options dealing with the issue of governing law and conflict of laws in a letter of credit transaction:[656]

(a) to adhere to the current approach of viewing a letter of credit transaction through the lens of contractual analysis of relationships between the parties involved;

(b) to subsume the issues to the law governing the underlying transaction by viewing letter of credit transactions as merely the payment system;

(c) to define a new category of letters of credit for the conflict of laws purposes.

The authors correctly rejected option (b) because it is clearly against the autonomy principle, emphasised the need of re-conceptualisation of option (a), even though it "resolves most of the problems fairly satisfactory", and specified that option (c) may be the ideal solution, but one which is hard to achieve due to the need to amend a number of local statutes.[657] Similarly, Markstein also supported the idea of creating a system which provided for legal certainty in the absence of an express choice of law in a letter of credit transaction.[658] Such a system, she emphasised, may contain special rules that depart from traditional private international law rules, but would be most closely connected to the letter of credit contract taking into account the parties' commercial expectations.[659] And this is precisely where *lex documentaria commercium* can step in and fill the gap.

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[655] Markstein (n 600) 153-162.
[656] Ellinger and Neo (n 388) 354.
[657] ibid.
[658] Markstein (n 600).
[659] ibid; Teoh (n 388) 69.

3.5. *Lex documentaria commercium* as the governing law for documentary instruments

In essence, as described in many of the judgments cited above,[660] it would be desirable that the same system of law governs all relations within a letter of credit transaction. Nevertheless, in practice it is hard to achieve such a situation when seeking to find a shelter in a particular national system of law.[661] It seems that in an attempt to meet commercial expectations of the parties the courts have endeavoured to apply the same governing law of a particular state to all the relations in a letter of credit transaction.[662] However, the pitfall in this approach is that inevitably one of the parties would be at a disadvantage because foreign law would be used for the regulation of its relations with a counterparty. Notably, commentators prior to *Taurus* argued that court decisions regarding the governing law of letters of credit based their arguments for application of the same governing law due to the need for predictability and certainty in international trade, but achieved it at the expense of issuing banks.[663] It is not surprising that commentators following the decision in *Taurus* in their majority criticised the Lords' judgment, because it seeks to achieve the same goals at the expense of nominated and confirming banks.[664]

In fact, it is likely that an outcome that would satisfy all parties involved in a letter of credit transaction is unachievable through means of national law, simply because of its apparent inability to regulate satisfactorily trade finance documentary instruments. This can be attributed to a number of factors, but, as has been discussed in section 1.1.3 of Chapter 1, since letters of credit originate from *lex mercatoria*, national laws often add artificial barriers and unnecessary confusion to the long-established functioning of letters of credit (as well as other documentary instruments). Consequently, this results in an array of problems which typically hinder smooth market practices. Furthermore, as highlighted above, the traditional conflict of law rules are also of little assistance in determining the governing law of documentary instruments.[665] Most often this is because of the flexible nature of documentary instruments, such as the fact that the law of the transaction (the place of performance or payment) may switch several times due to the actions of the parties involved or the occurrence of certain circumstances, *e.g.* adding confirmation by the confirming bank or failure of the nominated bank to honour a complying presentation. In addition, the parties rarely think about the governing law of a documentary instrument: current market practice is to specify what soft law rules apply to the instrument rather than national law.

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[660] See, for example *Bank of Credit and Commerce Hong Kong Ltd (in liq.) v. Sonali Bank* [1995] 1 Lloyd's Rep. 227 and *Offshore International SA v Banco Central SA* [1976] 2 Lloyd's Rep (QB) 402.

[661] Andrew McKnight, 'A Review of Developments in English Law During 2005: Part 2' (2006) 21(4) Journal of International Banking Law and Regulation 176, 192.

[662] Markstein (n 600) 138.

[663] Creed (n 603) 47.

[664] Gwynne, 'Letters of credit in the Supreme Court' (n 642); Gwynne, 'The Governing Law(s) of a Letter of Credit' (n 642); Tricks (n 642). Although see Tham (n 648), who welcomes new approach.

[665] Roger Gewolb, 'The Law Applicable to International Letters of Credit' (1966) 11 Villanova Law Review 742, 753.

The idea of *lex mercatoria* being the governing law of documentary instruments, in particular letters of credit, is not new and has been expressed by scholars from various jurisdictions.[666] However, due to the unacceptability of *lex mercatoria* in many countries,[667] at least in the 1970s-1980s, this idea had not been developed further. Nevertheless, even at that time of cautious attitude towards *lex mercatoria*, some academics proposed that the ICC-developed soft law should take a lead in governing letters of credit and national law should be used to interpret and complement it on points where such soft law was silent,[668] *i.e.* suggesting interdependence of soft and state law in the area of trade finance. This idea is still relevant.[669]

Lex documentaria commercium, as has been demonstrated in section 3.2.3 above, is not purely a theoretical concept, but has a variety of sophisticated sources, which are frequently relied upon in practice. These sources are regularly updated to correspond with and reflect any changed market practices. Moreover, the ICC, as the leading developer of trade finance regulation, often issues its own clarifications with regards to any unclear aspects of documentary instruments' functioning. Thus, *lex documentaria commercium* has the required depth to offer an efficient regulatory regime for documentary instruments.

Therefore, given the difficulties in the determination of the governing law of documentary instruments as well as in order to avoid any complexities imposed by national law regimes (see the discussion above in section 3.3), I firmly suggest that documentary instruments should be treated as mercantile specialities regulated by the specific branch of *lex mercatoria* in the area of trade finance, namely *lex documentaria commercium*. In particular, subjecting documentary instruments to this non-national governing regime will facilitate an effective framework for documentary instruments without the need to adjust it artificially to or militate against the interests of any party to the transaction. Moreover, such a solution would not require significant amendment of local statutes (see the argument of Ellinger and Neo above), because many national systems actively rely on and encourage the parties to refer to trade finance soft law (identical to the concept of *lex documentaria commercium* proposed by me herein) in the light of the absence of any detailed regulations.

In fact, such lack of any detailed regulations to cover specific aspects of documentary instruments' functioning is one of the reasons why national law is not efficient in the regulation of documentary instruments and, consequently, is rarely explicitly chosen as the governing

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[666] See authors listed by Caprioli (n 471) 910; see also a reference to an unidentified French author in Ellinger and Neo (n 388) 44.

[667] Caprioli (n 471) 910.

[668] See reference to Herbert Schönle in Caprioli (n 471) 910.

[669] Warnasuriya (n 388) 91; James Barnes, 'Internationalization of Revised UCC Article 5--Letters of Credit' (1995) 16 Northwestern Journal of International Law & Business 215, 222-223; 'The Task Force Report on the Study of U.C.C. Article 5, "An Examination of U.C.C. Article 5 (Letters of Credit)"' (1990) 45 The Business Lawyer 1521, 1560-1561.

law.[670] For example, Alavi listed only 14 civil law jurisdictions[671] and the USA as the single example of common law jurisdiction which have any statutory rules regulating the functioning of letters of credit.[672] However, even if any provisions are included, they often tend to consist of only a few articles of a general nature.[673]

Perhaps, the only notable exception is Article 5 of the US Uniform Commercial Code (the UCC).[674] However, as has rightly been argued by some academics, the extent of the provisions of Article 5 of the US UCC is not enough to provide proper guidance for the parties.[675] Moreover, the revised Article 5 makes a direct reference to the UCP in its provisions[676] and is generally influenced by the language and concepts included in the UCP.[677] In particular, this led Levit to conclude that "nowhere in the world is the UCP's influence on domestic letters of credit law more explicit and more pronounced than in Revised Article 5 (Letters of Credit) of the United States' Uniform Commercial Code."[678] Barnes went even further in stating that the Revised Article 5 of the UCC explicitly recognised the law merchant as the governing law of letters of credit and appropriately limits the application of general contract law and principles of equity.[679] Whether or not such an observation is correct, the respective developments in the USA and other countries should not go unnoticed: in an extraordinary relationship national systems recognise and employ non-nationally developed rules for documentary instruments regulation, *i.e. de facto* giving them the force of hard law.[680]

Furthermore, such recognition and priority of non-national regulations sometimes becomes not only *de facto*, but *de jure*. For example, in Ukraine, Russia and Belarus there are some statutory provisions regarding the regulation of letters of credit. However, they are not detailed and merely provide for a description of the types of letters of credit, definitions of banks participating in the transaction and the obligation to honour the complying presentation.[681]

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[670] Ellinger and Neo (n 388) 22, 54; Rolf Schütze and Gabriele Fontane, *Documentary Credit Law Throughout the World: Annotated Legislation From More Than 35 Countries* (ICC Publishing 2001); Alavi, 'Legal Nature and Sources of Law' (n 442) 111; De Ly (n 458) 833-834; Schulze (n 396); Byrne (n 56) 18; Byrne, 'Contracting out of Revised UCC Article 5 (Letters of Credit)' (n 480) 305; Kelly-Louw (n 40) 2; See also Roberto Bergami, 'Letter of Credit Risks in Uncertain Financial Times' (Shipping Solutions, 22 March 2009) <https://www.shippingsolutions.com/blog/letter-of-credit-risks-in-uncertain-financial-times> accessed 20 September 2019.

[671] These countries include Colombia, El Salvador, Greece, Guatemala, Honduras, Lebanon, Mexico, Syria, Italy, Bolivia, Lebanon, Kuwait, Iraq and Bahrain.

[672] Alavi, 'Legal Nature and Sources of Law' (n 442) 111, 116; see also Ellinger and Neo (n 388) 58-59.

[673] Kelly-Louw (n 40) 38; Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1181.

[674] Byrne, 'Contracting out of Revised UCC Article 5 (Letters of Credit)' (n 480) 315.

[675] De Ly (n 458) 834; Kelly-Louw (n 40) 3.

[676] See § 5-116 (c) of the UCC: "Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject". Such direct reference was actually encouraged by Task Force (n 669) 1559-1561.

[677] See Barnes, 'Internationalization of Revised UCC Article 5' (n 669) 222-223; An Oelofse, 'Developments in the Law of Documentary Letters of Credit' (1996) 8 South African Mercantile Law Journal 289, 291.

[678] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1182.

[679] Barnes, 'Internationalization of Revised UCC Article 5' (n 669) 223.

[680] Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 140-141.

[681] See articles 1093-1098 of the Civil Code of Ukraine 2003, articles 867-873 of the Civil Code of the Russian Federation 1994.

Needless to say, such regulation is insufficient to cover complex issues arising out of letter of credit practice.[682] Remarkably, all of these codes contain an express provision stating that banking rules, practices, usages and customs apply to the regulation of letters of credit.[683] Moreover, pursuant to the mandatory regulations issued in these countries by the respective national (central) banks, all commercial banks must use the UCP and international standard banking practice when dealing with documentary credits if a letter of credit is subject to it (Belarus)[684] or even regardless if the UCP is incorporated (Ukraine, Russian Federation and also Kazakhstan).[685] Perhaps, such practice roots from the instruction of the Foreign Trade Bank of the USSR issued in 1985 which made the UCP mandatory for its own use (and, consequently, its customers, *i.e.* all Soviet commercial organisations involved in foreign trade) in the transactions involving letters of credit.[686] As a matter of fact, at the time of writing this instruction is still valid and following several amendments is used in the Russian Federation.

It is likely that similar incorporation of the UCP into national legislation is also present in other jurisdictions.[687] For example, it has been reported that the Supreme People's Court of the People's Republic of China adopted specific rules governing letter of credit disputes, which not only pledge to honour the parties' choice to apply any international customs, usages, practices or any other rules to govern their relations, but have also pointedly pronounced the UCP as the governing default law in the absence of any explicit agreement by the parties.[688] In fact, even in dispute resolution it has been noted that national courts are reluctant to depart from the uniform rules, guidelines and opinions of the ICC.[689] Levit explains this phenomenon by the awe of the ICC-developed soft law and its transcendence.[690] I should also add to this the apparent inability of national law to offer effective and sound solutions for commercial parties involved in trade finance.

Thus, it is clear from the above that the vast majority of national systems, recognising the

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[682] Compared to Ukrainian and Russian civil codes, the Banking Code of the Republic of Belarus 2002 seems to be more advanced and includes several additional provisions, but all of them are either direct or slightly adjusted wording of the UCP (see articles 254-268). Perhaps this is a direct result of the fact that Belarus is one of the few countries that have ratified the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.

[683] See article 1088(4) of the Civil Code of Ukraine 2003, article 867(5) of the Civil Code of the Russian Federation 1994, article 266 of the Banking Code of the Republic of Belarus 2002.

[684] See the Regulation of the National Bank of the Republic of Belarus No. 217 "On the approval of the Instruction on the procedure of documentary transactions by the National Bank of the Republic of Belarus" dated 08 July 2004.

[685] See the Regulation of the National Bank of Ukraine No. 514 "On the approval of the settlement procedure by banks under letter of credit transactions" dated 03 December 2003; the Regulation of the National Bank of the Republic of Kazakhstan No. 199 "On the approval of the Rules for documentary credit transactions by the banks of the Republic of Kazakhstan" dated 22 October 2014. Note that there are no provisions for the regulation of letters of credit included in the Civil Code of the Republic of Kazakhstan.

[686] See Chapter 4 of the Instruction of the Foreign Trade Bank of the USSR No. 1 "On the procedure of banking transactions in relation to international settlements" dated 25 December 1985.

[687] Schulze (n 396) 229; Ellinger and Neo (n 388) 54; see the example of Hungary in Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 203; Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1181.

[688] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1181; see also Byrne, 'Contracting out of Revised UCC Article 5 (Letters of Credit)' (n 480) 318-320.

[689] Chuah (n 600).

[690] Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1224.

soundness and quality of non-national regulations in trade finance, choose to embrace such privately developed norms rather than to supersede them. This reliability on non-nationally developed regulations proves the support that national legal systems render to private norm-making in the area of trade finance.

3.6. Conclusions

The purpose of this chapter is two-fold. First and foremost, it has explored the existence of a separate branch of modern *lex mercatoria* in the area of trade finance, namely *lex documentaria commercium*. It has been shown that *lex documentaria commercium* satisfies the first three criteria outlined in section 2.4 of Chapter 2 and should be recognised as a branch of the modern law merchant.

Specifically, it is based on two key industry-specific distinct principles: the autonomy (independence) principle and the principle of strict compliance. These two principles are the cornerstone of *lex documentaria commercium* as the regulation of documentary instruments is structured around and is functioning on the basis of them. Moreover, they are not static and have been evolving under the influence of market practice, thus changing their nature (such as, for example, the robustness of the strict compliance principle) and developing some adjacent additional principles, customs and usages. Such a process is indeed the essence of *lex mercatoria* formation.

As discussed in section 2.2.2 of Chapter 2, every branch of the new *lex mercatoria* requires a private industry association for its promulgation. For *lex documentaria commercium*, such association is the ICC (and its Banking Commission in particular). The ICC is the leading private association responsible for the development, promotion and codification of trade finance practices. In line with its role, the ICC has developed a number of regulations, rules and guidance to assist the parties involved in international trade and banks when dealing with documentary instruments. These ICC-developed soft law regulations are widely used in the industry and constitute core sources of *lex documentaria commercium* (see the detailed overview of them in section 3.2.3.2 above). In fact, nearly all documentary instruments are issued pursuant to the ICC-developed uniform rules with no reference whatsoever to any national law. Moreover, such uniform rules have also benefited from regular updates, restatements and clarifications issued by the ICC, thus ensuring their robustness and practical relevance.

Furthermore, many of such uniform rules have influenced domestic legislation or even been given the force of law in some states. Importantly, the ICC-developed uniform rules, along with the ISBP, ICC Opinions and DOCDEX Decisions, are often used in dispute resolution in the manner similar to legal statutes. In fact, there have been judgments reported that have described some of the uniform rules to be so widely used, internationally recognised and well-known to industry players that they should be applied even in cases when the parties do not

unequivocally refer to them.

In turn, this aligns with other criteria for a branch of *lex mercatoria* to be recognised: the support of states and international community for the activities of the ICC. Specifically, the ICC has been in close cooperation with various states and international organisations, which has resulted in the wide acceptance of ICC-developed regulations. Moreover, the ICC became the first ever private organisation to acquire Observer Status at the United Nations. Furthermore, a number of its uniform rules have been endorsed by UNCITRAL, thus signalling the quality of the ICC's norm-making and incentivising their wider acceptance. Thus, among all the discussed branches of the modern law merchant, *lex documentaria commercium* gets the most support from national and international authorities.

Secondly, this chapter has highlighted the problematic issue of determination of governing law in documentary instruments. Whilst not of crucial importance for the traders at the time of the transaction, it becomes apparent especially in the context of dispute resolution. As the functioning of documentary instruments is predominantly self-regulatory and does not rely on national law of any kind to support it, it is an exceptional practice to specify a governing law of the instrument. However, when disputes concerning documentary instruments arise and reach the courts, judges are faced with substantial difficulties when determining the relevant governing regime of the instrument. Often they will (instinctively or as per their judicial training) take purely legal approaches and apply national law rules without proper consideration of the peculiarities of the functioning of documentary instruments. In particular, courts are unlikely to view a dispute before them through the prism of *lex mercatoria*, but will spend a significant amount of resources in determining the applicable law of a certain jurisdiction. Such determination is likely to be taken under the general conflict of law rules and often leads to results that contradict established market practice and expectation of trade finance actors.

In an example given in this chapter I have emphasised two primary reasons for such unfortunate outcomes: (a) the lack of understanding of the structure of a letter of credit transaction and roles and functions of banks in such transaction, and (b) the strong desire to tie parts of the same transaction to certain national law, which typically can offer little aid due to the absence of any specific regulation of documentary instruments. As per the example provided in this chapter, this has resulted in a situation wherein the structure of a letter of credit has remained the same for more than a hundred years, whilst the rules for determination of the governing law of the transaction have been changed a number of times. Thus, national law cannot offer an effective regime for the regulation of documentary instruments.

At the same time, in line with the notion expressed throughout this work that modern *lex mercatoria* and national law should not compete but complement each other, the area of trade finance is a vivid example of how state law and self-regulation can effectively co-exist. Moreover, in the light of difficulties associated with the determination of the governing law in

documentary instruments, it is herein suggested that the concept of *lex documentaria commercium* should be embraced and allocated a leading role in this symbiotic relationship. Thus, I suggest that *lex documentaria commercium* should be given priority in the regulation of parties' relations as a default regime, unless other governing law is expressly chosen by the parties to a documentary instrument (a practice which infrequently takes place at the moment). In fact, in many jurisdictions this development seems to be underway, which is proven by numerous instances of express references to, authorisation of and encouragement to use ICC-developed rules found in national statutes and international conventions. Active incorporation of provisions or sometimes even whole sets of ICC-developed soft law into national legislation explicitly shows the value of and weight placed on privately developed regulation in trade finance.

Having *lex documentaria commercium* as the default regime for the regulation of documentary instruments will have a significant positive impact on the effectiveness of dispute resolution. Specifically, judges will be freed from burdensome efforts to investigate which jurisdiction's law is applicable to a documentary instrument, whilst the parties would not be caught unawares to learn that their obligations and responsibilities are suddenly governed by the law of a foreign jurisdiction. Moreover, the idea of dispute resolution based completely on *lex documentaria commercium* and its non-national sources is not only achievable in practice but also produces more efficient results. In fact, as will be discussed further in Chapter 4, the wish of commercial actors to achieve more efficient dispute resolution than national systems can offer is one of the reasons for separation of the modern *lex mercatoria* into distinct branches. Consequently, successful dispute resolution on the basis of industry-specific principles, customs and usages comprises another criterion for a distinct branch of the modern law merchant. Therefore, in Chapter 5 I will analyse DOCDEX, a dispute resolution system designed by the ICC, which successfully handles disputes exclusively on the basis of the ICC-developed rules and international standard practice in trade finance.[691]

[691] See Article 2(2) of the DOCDEX Rules.

CHAPTER 4. DISPUTE RESOLUTION WITHIN BRANCHES OF THE NEW *LEX MERCATORIA*

4.1. Introduction

As has been highlighted in section 1.3 of Chapter 1, the theory of the new *lex mercatoria* is closely associated with alternative dispute resolution, in particular arbitration. In fact, it is often emphasised that the establishment of a global arbitration framework was one of the reasons for the emergence of the modern law merchant.[692] Indeed, nowadays most modern arbitration laws allow the parties to subject their agreement to *lex mercatoria* through reference to 'rules of law' rather than 'law',[693] and most arbitration institutions worldwide permit the parties to choose *lex mercatoria* as applicable rules of law.[694] Therefore, despite the debate over the elements and theoretical nature of the modern law merchant, *lex mercatoria* is a legal reality in international commercial arbitration[695] with a number of arbitral awards made on its basis recognised and enforced in a variety of jurisdictions.[696]

Whilst the use of the theory of *lex mercatoria* in arbitration has been the primary focus of many academic studies,[697] it is surprising to observe the scarcity of literature analysing the modern law merchant in the context of other forms of alternative private dispute resolution, especially given the rising popularity of the latter.[698] As is emphasised in section 1.4 of Chapter 1, this thesis proceeds on the assumption that the use of *lex mercatoria* in dispute resolution is not restricted to arbitration only, but could be relevant to all forms of private dispute resolution

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[692] See, for example, Cuniberti (n 23) 374-375; Alec Stone Sweet (n 11) 637-638; Yildirim (n 83) 5-6; Mazzacano (n 16) 13-14.

[693] Petsche (n 72) and Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 992. See notable Art 187(1) of the Swiss Federal Act on Private International Law 1987 and Article 1511 of the French Code of Civil Procedure 2007. See also Art. 1054(2) of the Dutch Code of Civil Procedure 1986.

[694] Petsche (n 72) 499. See, for example, the rules of the International Chamber of Commerce, the London Court of International Arbitration, the American Arbitration Association and the Vienna International Arbitration Center.

[695] Cuniberti (n 23) 380; Khalil (n 112) 20; Berger (n 21) 293; Nel (n 112); Hugo (n 112) 148; Lando, 'The Law Applicable to the Merits of the Dispute' (n 96); Erdem and Süral (n 72). Furthermore, see also Wethmar-Lemmer (n 1) 199: "[...] it may be said with certainty that, as long as international commerce exists, the *lex mercatoria* will exist", and Howarth (n 72) 60: "[...] there is now little uncertainty regarding validity of *Lex mercatoria* as the substantive law in international commercial arbitration."

[696] See, for example, ICC Case No. 7375, Award (1996), ICC Case No. 9875, Award (1999), SCC Case No. 117/1999, Partial Award (1999) as cited in Toth (n 15) 211-217, 232; *Norsolar SA (France) v. Pabalk Ticaret Ltd. Sirketi (Turkey)* (1985) Cour de cassation, First Civil Chamber, No. 83-11355, *Fougerolle (France) v. Banque du Proche-Orient* (1982) Cour de cassation, Second Civil Chamber, No. 80-15306, *Norsolor SA v. Pabalk Ticaret Ltd. Sirketi* (1983) Oberster Gerichtshof (Supreme Court of Austria), *Ministry of Defence of the Islamic Republic of Iran v Gould, Inc* (887 F2d 1357 (9th Cir 1989) as cited in Petsche (n 72) 504; *Primary Coal Incorporated v. Compania Valenciana de Cementos Portland* (1988) Cour d'appel de Paris, No. 5954 as cited in Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 993; *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co and Shell International Petroleum Co. Ltd.* [1987] 2 Lloyds 246; *Damiano v. Topfer (Cass. 1982) 105 Foro. It. I 2285, 2288* as cited in Wilkinson (n 6) 113. Such awards are also urged to be recognised and enforced by the International Law Association, see Petsche (n 72) 505. However, see Wilkinson (n 6) 113 where the author argues that these limited cases are not significant enough to claim recognition of *lex mercatoria* worldwide. Similarly on this point, see also Mustill (n 32) 107-109; Toth (n 15) 21: "These rulings may hardly be cited in favour of the existence of an autonomous a-national *lex mercatoria* because they never addressed this issue in the first place". At the same time, some claim that awards made on the basis of *lex mercatoria* have not been set aside by the national courts, see Arenas (n 99) 24; Lew, Mistelis and Kröll (n 121) 455; Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (n 121) 755.

[697] See, for example, Elcin (n 31) 186-187; Ciurtin (n 2); Jemielniak (n 147); Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (n 121); Howarth (n 72) 78-63; Shmatenko (n 147).

[698] See the results of 2018 International Arbitration Survey (n 210) 5-6. In particular, whilst in 2015 the use of arbitration in conjunction with other ADR methods was favoured by 34% of respondents, in 2018 such proportion rose to 49% of respondents, thus being the dominant choice for the preferred dispute resolution option.

provided that certain conditions for development of the law merchant are present.

In addition, as has been discussed in section 2.2.4 of Chapter 2, in the last few decades the drive towards more efficient conflict resolution has resulted in the establishment of sector-specialised dispute resolution centres.[699] Noticeably, such dispute resolution centres often function in those sectors which are frequently taken as examples of *lex mercatoria* and its branches, such as sport or the maritime industry. Moreover, as will be shown in this chapter, industry-specialised dispute resolution[700] has features which are very distinct from what is traditionally perceived to be the essence of private conflict resolution, such as enhanced transparency and extensive reliance on past cases. The absence of these features has long been viewed as inherent barriers to the progressive and coherent development of the modern law merchant through private dispute resolution. Thus, as has been shown in section 1.3 of Chapter 1, for a considerable time the opponents of *lex mercatoria* have been successful in proving that effective dispute resolution on the basis of the law merchant is not feasible and should be avoided.[701] Therefore, given the above and as identified in the discussion in sections 2.2.4 and 2.4 of Chapter 2, the availability of an industry-specific dispute resolution authority (which may or may not be an arbitration centre) is a vitally important criterion for recognition of a branch of *lex mercatoria*. Moreover, such industry-specific dispute resolution authority should possess features which would ensure consistent and coherent development of the modern law merchant.

This chapter is structured as follows. Firstly, I will discuss the differences between industry-specialised and general private alternative dispute resolution. This section will not only highlight the reasons behind the desire to establish industry-specific dispute resolution centres, but also identify the features of such conflict resolution. As will be shown, the features identified assist in the development of a coherent and consistent modern law merchant. Therefore, for the purposes of the fulfilment of the last criterion for the recognition of separate branch of modern lex mercatoria, a dispute resolution provider functioning within such a branch should possess these features.

Secondly, I will explore dispute resolution in *lex sportiva*, *lex maritima*, *lex informatica* and *lex petrolea*. Specifically, I will examine whether there is a leading private industry-specific dispute resolution authority in these areas and test whether such authority has the required features for the coherent and consistent development of *lex mercatoria*.

Consequently, the findings of this chapter will allow for defining relevant features of industry-

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[699] Gembiś (n 216).

[700] Hereinafter similar terms such as industry-specific, sector-specific and/or sector-specialised dispute resolution are used as synonyms and refer to dispute resolution centres specialising in rendering services of conflict resolution exclusively in a particular sector of the economy.

[701] See section 1.3 of Chapter 1 and reference to Schultz (n 132) 703-708; see also similar discussions in Michaels, 'The True *Lex Mercatoria*' (n 1) 456; Cremades and Plehn (n 36) 336-337; Alec Stone Sweet (n 11) 642-643.

specialised dispute resolution, without which the fulfilment of the last criteria for recognition of a branch of *lex mercatoria* is not possible.

4.2. Differences between general and industry-specialised private dispute resolution

It has been noted that industry-specialised dispute resolution is very different in comparison with general private conflict resolution. This difference is especially perceptible in arbitration.[702] In addition, there have been several innovative sector-specific dispute resolution services launched in the last couple of decades, whose nature is difficult to classify under the traditional perception of dispute resolution.[703]

Firstly, industry-specialised dispute resolution is designed to provide greater comfort for the users due to the fact that disputes are resolved by specialists in the particular field and under the rules of dispute resolution which are specifically tailored for a particular area.[704] In practice, this means that a decision-maker enjoys stronger authority due to his/her theoretical knowledge backed by practical experience in the relevant area. Consequently, a decision made by such a specialist is usually not challenged in court proceedings, *i.e.* the parties rarely raise any objections to such decision even though they have such an option.

Secondly, the transparency of the specialised dispute resolution proceedings is usually much greater. The difference is especially relevant to arbitration. In particular, arbitration has always been considered as a confidential process and for decades since the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 it was deemed that confidentiality was the main attraction of the arbitral process as opposed to the public nature of litigation. However, recent studies have revealed that confidentiality is no longer perceived as the main advantage of arbitration.[705] In addition, a number of academics have argued that transparency and confidentiality are not mutually exclusive and thus publication of arbitral awards with certain safeguards such as anonymity of the parties is possible.[706]

In fact, as early as in 1982 Lew argued that systematic publication of arbitral awards would

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[702] Dietz (n 137) 184-219; see also Kaufmann-Kohler (n 138); Nicolas Béguin, 'The Rule of Precedent in International Arbitration' (2009) Jusletter 5.

[703] Luke Nottage, 'The Vicissitudes of Transnational Commercial Arbitration and *Lex Mercatoria*' (2000) 16 Arbitration International 53; Antonis Patrikios, 'The Role of Transnational Online Arbitration in Regulating Cross-Border E-Business – Part I' (2008) 24 Computer Law & Security Report 66, 74; Henry Perritt, 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (2000) 15 Ohio State Journal on Dispute Resolution 675; see also Peter Adler, 'The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement' in Sally Engle Merry and Neil Milner (eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (University of Michigan Press 1995) 67-87.

[704] Gembiś (n 216).

[705] 2018 International Arbitration Survey (n 210) 7.

[706] Rinaldo Sali, 'Chapter 4. Transparency and Confidentiality: How and Why to Publish Arbitration Decisions' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: the Case for the Anonymous Publication of Arbitral Awards* (Juris 2013) 73; Alberto Malatesta, 'Chapter 2. Confidentiality in International Commercial Arbitration' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: the Case for the Anonymous Publication of Arbitral Awards* (Juris 2013) 49-51; Alexis Mourre, 'Chapter 3. The Case for the Publication of Arbitration Awards' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: the Case for the Anonymous Publication of Arbitral Awards* (Juris 2013) 67-72. In fact, such practice is successfully followed, albeit to a certain degree, by some arbitration institutions, such as the ICC and the SCC.

bring substantial benefits to all interested parties.[707] These include increased certainty and predictability of the process for businesses (thus influencing their commercial practices), provision of arbitrators with reliable guidance with regards to how similar situations have been resolved in past cases, and, additionally, facilitation of the commercial world's knowledge and acceptance of *lex mercatoria*.[708] Wider publication of arbitral awards has certainly contributed to the emergence of a specific body of law consisting of arbitral panels' positions expressed with regards to certain aspects.[709] This is especially relevant to industry-specialised dispute resolution, wherein often the parties have a very specific or technical issue in dispute which is not covered, at least directly, by any applicable legal norm. Thus, the task of a decision-maker is often to interpret all relevant sources, from international conventions and national laws to trade standards, usages and practices, in order to justify his/her approach.

Thirdly, as a result of greater transparency, the industry-specialised dispute resolution providers have developed the practice of allocating a precedential value to their previously rendered decisions. This sort of precedential value cannot be truly compared to the *stare decisis* doctrine as practised by, for example, courts in common law jurisdictions, because such a requirement of mandatory use of previously rendered decisions is absent in the procedural rules of the specialised dispute resolution providers. However, either through the wish of such industry-specialised dispute resolution centres to enhance uniformity and predictability in their services, or through the practice of the users who want to use every means and argument to support their position in a case, or both, referencing to the positions expressed in previous cases has become an inherent feature of specialised dispute resolution. Kaufmann-Kohler[710] identified such practice as a persuasive precedent close to the concept of *jurisprudence constante*,[711] whilst Béguin called it a *de facto precedent*.[712]

Béguin further lists several reasons why industry-specific arbitration operates with precedents more frequently in comparison to general arbitration. These are:[713] a) the application of a specific body of rules that requires uniform construction; b) the greater need for consistency; and c) the accessibility of previous case law which ensures that a decision-maker is reluctant to depart from previous positions for credibility reasons. Guillaume adds to this list that reliance

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[707] Lew (n 76) 232.

[708] ibid; see also Sali (n 706) 84-85; Fausto Pocar, 'Foreword' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: the Case for the Anonymous Publication of Arbitral Awards* (Juris 2013) xvii.

[709] Mourre (n 706) 59.

[710] ibid 54; Kaufmann-Kohler (n 138); Alexis Mourre, 'Arbitral Jurisprudence in International Commercial Arbitration: The Case For A Systematic Publication Of Arbitral Awards In 10 Questions... ' (*Kluwer Arbitration Blog*, 28 May 2009) <http://arbitrationblog.kluwerarbitration.com/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions/> accessed 20 September 2019; Andrea Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' in Colin Picker and others (eds), *International Economic Law: The State and Future of the Discipline* (Hart Publishing 2008) 265.

[711] A civil law doctrine pursuant to which a series of previous decisions applying a particular legal principle or rule is highly persuasive but not decisive in subsequent cases dealing with similar or identical issues of law.

[712] Béguin (n 702) 7. See also Niccolò Ridi, 'The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 (2) Journal of International Dispute Settlement 200, 245-247.

[713] Béguin (n 702) 7.

on precedents is especially vital in the new branches of law in order to create a certain norm.[714]

According to Mourre, the main condition for arbitration awards to have a precedential effect is their systematic publishing in accessible and sufficient quantity,[715] *i.e.* the transparency of the outcome of an arbitral process. As there is considerable lack of transparency in general arbitration institutions, this is the main reason why past arbitral awards are not cited more frequently.[716] However, this is not the case in industry-specific dispute resolution. In addition, the caseload of most of the specialised dispute resolution centres significantly exceeds the caseload of any general arbitral institution. Consequently, availability of a constant flow of decisions on a specific issue has resulted in a consistent body of legal norms in relation to some very specific industry aspects. Thus, this forms the basis of a claim for the existence of the branches of *lex mercatoria* in some industries.

In the remainder of this chapter, an analysis and evaluation of the activities of the main specialised dispute resolution centres in sport, maritime matters, cyberspace regulation and the petroleum industry, *i.e.* those industries which are closely associated with the branches of *lex mercatoria*, has been made. In particular, my research has concentrated on the key aspects outlined above: the availability of the leading sector-specialised dispute resolution provider, publication of the outcomes of dispute resolution proceedings, reference to past decisions by the parties in their submissions and reliance of decision-maker(s) on previous cases, and, specifically, analysis of the norms used for resolving disputes.

4.3. Dispute resolution within *lex sportiva*

4.3.1. The leading dispute resolution authority

The central authority for *lex sportiva* is the Court of Arbitration for Sport (the CAS) and its jurisprudence.[717] In essence, the CAS applies, interprets and, most importantly, creates legal norms with regards to sport regulation.[718] In fact, the CAS is widely recognised as the world's supreme court for sport[719] and such supremacy is ensured through the specification of the CAS's authority in the Olympic Charter, virtually all of the international federations' statutes, the WADA Code[720] and many other legal documents of the sports system via ad hoc clauses[721] to resolve disputes. Thus, most, if not all, disputes in the area of sport eventually end up at the CAS (if not settled or otherwise amicably resolved by the parties). However, this was not the

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[714] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 (1) Journal of International Dispute Settlement 5, 23.

[715] Mourre (n 706) 60. See also Emmanuel Jovilet, 'Access to Information and Awards' (2006) 22 (2) Arbitration International 265.

[716] Mourre (n 706) 63.

[717] Parrish (n 136) 719; James Nafziger, *International Sports Law* (2nd edn, Transnational Publishers 2004) 48–61; Casini, 'The Making of a *Lex Sportiva*' (n 268) 22; James Nafziger, 'The Future of International Sports Law' (2006) 42 Willamette Law Review 861, 876.

[718] Parrish (n 136) 719

[719] As was stated in *A.B. v. IOC* (27 May 2003) Swiss Federal Supreme Court; see also Mitten (n 136) 9.

[720] Duval (n 273) 830; Mitten (n 136) 9; See also article 8.5 of the WADA Code.

[721] Casini, 'The Making of a *Lex Sportiva*' (n 268) 24; Gómez (n 136) 127; Simon Boyes, 'Sports Law: Its History and Growth and the Development of Key Sources' (2012) 12 (2) Legal Information Management 86, 91.

case until relatively recently. Since the establishment of the CAS in 1984, only 131 cases were heard before it until 1994, when a major restatement of the CAS Code was published. Even after the implementation of this procedural and organisational reform it was not until the beginning of this century when the CAS started to receive a significant amount of caseload.[722] This is attributed largely to the fact that many international federations had simply ignored the CAS and used their own judicial bodies for resolving the relevant disputes.[723]

The mission of the CAS as provided by the Code of Sports-related Arbitration is to constitute arbitration panels having "the responsibility of resolving disputes arising in the context of sport" in accordance with its procedural rules.[724] At the same time, the CAS will not resolve any and all sports-related issues: it generally considers to be non-justiciable disputes that involve a sport's rules of the game and referee field of play decisions, thereby avoiding interference in the autonomy of the Olympic and international sports governing bodies which have authority to determine or resolve these issues.[725]

Many prominent academics claim that due to its specialisation and specific orientation to sport, the CAS is better placed than state courts to resolve disputes relating to sporting issues because problems with any inconsistent rulings are thereby avoided.[726] The rationale behind this is that "globalised sport is better served through discrete sporting channels that can ensure consistent and harmonised standards rather than through ordinary courts at national or international level that cannot".[727] The CAS ensures the parties' compliance with applicable sports rules, protects the integrity of competition, and respects the parties' procedural and substantive rights.[728] Thus, it is argued that *lex sportiva* has emerged as a response to these specific judicial needs of global sport, which could not be properly addressed by ordinary courts,[729] and that its purpose is to stabilise expectations of the parties involved in sport about

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[722] See official statistics, Court of Arbitration for Sport, 'Statistics' (2016) <http://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf> accessed 20 September 2019.

[723] Casini, 'The Making of a *Lex Sportiva*' (n 268) 23.

[724] See S12 of the Code of Sports-related Arbitration.

[725] Mitten (n 136) 11; see also *Behdad Salimi & National Olympic Committee of the Islamic Republic of Iran (NOCIRI) v. International Weightlifting Federation (IWF)*, CAS ad hoc Division (OG Rio) 16/028, award dated 21 August 2016; *Vanderlei De Lima & Brazilian Olympic Committee (BOC) v. International Association of Athletics Federations (IAAF)*, CAS 2004/A/727, award dated 8 September 2005

[726] Parrish (n 136) 721; Mitten and Opie (n 268) 292. In fact, even some state courts expressed the same opinion, see Megarry V.C. in *McInnes v Onslow-Fane and Another* [1978] 1 W.L.R. 1520 at 1535: "I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts". See also the US case of *Martin v. International Olympic Committee* [1984] 740 F.2d 670 (9th Circ.) regarding refusal to interfere with the programme of the 1984 Los Angeles Olympic Games.

[727] Parrish (n 136) 721; Casini, 'The Making of a *Lex Sportiva*' (n 268) 24.

[728] Matthew Mitten, 'Dispute Resolution in Olympic and International Sports' (2016) 16 Insights on Law & Society 12.

[729] Parrish (n 136) 721. See also Statement of the Court of Arbitration for Sport (CAS) on the Decision Made by the Oberlandesgericht München in the Case between Claudia Pechstein and the International Skating Union (ISU) (27 March 2015) <https://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf> accessed 20 September 2019.

the arbitration of particular issues.[730]

In addition, using the CAS as a platform for dispute resolution provides for swift and inexpensive decision-making procedures and minimises the risk of any bias (as compared to a court system of a particular state).[731] It is widely recognised that any dispute resolution system (governmental or private) should be capable of provision of procedural fairness and substantive justice.[732] When defining these categories, one should take into consideration that procedural fairness includes provision of adequate notice of rules to individuals and adequate opportunity to present their case to an unbiased decision-maker.[733] Procedural fairness, when used in combination with good faith and on the basis of evidence presented by the parties, results in substantive justice, which, in turn, relies on the applicable precedent to produce the same results in the same type of cases.[734]

In this matter, Mitten states that in order to provide procedural fairness and substantive justice in the area of sport, the CAS should, as a minimal threshold, meet the following requirements:[735]

a) be an open forum accessible to all aggrieved parties;

b) consist of independent and impartial adjudicators;

c) provide a full and fair opportunity for all parties to be heard;

d) render timely, reasoned, and final decisions; and

e) develop a clearly articulated uniform body of law (which provides equal and unbiased treatment of those similarly positioned) resulting in the consistent, predictable

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[730] Parrish (n 136) 721. Compare this with the similar logic for the recognition of *lex mercatoria*. Other academics even go as far as to assert that state courts are posing a threat to sporting institutions' autonomy (see Casini, 'The Making of a *Lex Sportiva*' (n 268) 26; J Jack Anderson, '"Taking Sports Out Of The Courts": Alternative Dispute Resolution and the International Court of Arbitration for Sport' (2000) 10 Journal of Legal Aspects of Sport 123). Another interesting view suggests that national courts can view *lex sportiva* as guidance that should be followed in sport cases (see Foster, 'Is there a global sports law?' (n 264) 49).

[731] Gandert (n 326) 287-288.

[732] Mitten, 'The Court of Arbitration for Sport' (n 136) 18; Tom Tyler, *Why People Obey The Law* (2nd edn, Princeton University Press 2006); Amy Gangl, 'Procedural Justice Theory and Evaluations of the Lawmaking Process' (2003) 25 Political Behavior 119; Tom Tyler, 'What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law & Society Review 103; Tom Tyler, 'Governing Amid Diversity: The Effect of Fair Decision-making Procedures on the Legitimacy of Government' (1994) 28 Law & Society Review 809.

[733] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982); *Mathews v. Elridge*, 424 U.S. 319 (1976). See also Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Switzerland is a contracting party, that creates an individual right to a "fair trial" requiring "a fair and public hearing [including a public judgment] within a reasonable time by an independent and impartial tribunal established by law, which decides on civil rights and obligations." See Ulrich Haas, 'Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures' (2012) 12 (3) International Sports Law Review 43.

[734] As one commentator notes: "It is of the very essence of any system of law, of course, that its rules are consistent, accessible and predictable. Lawyers must be able to advise their clients with a degree of confidence as to what those rules actually are. It is only with such predictability that the core objectives of swift and inexpensive justice can be achieved. Without legal certainty, every case, no matter how small and apparently straightforward, will descend into an expensive legal debate", see James Segan, 'Does the Court of Arbitration for Sport Need a Grand Chamber?' (*Sports Law Bulletin*, 19 April 2013) <http://sportslawbulletin.org/2013/04/19/does-the-court-of-arbitration-forsport-need-a-grand-chamber/> accessed 20 September 2019.

[735] Mitten, 'The Court of Arbitration for Sport' (n 136) 20.

application of the relevant governing body's regulations and rules of law.

Following his analysis, Mitten concludes that while it is very difficult objectively to measure the extent to which the CAS arbitration system produces substantive justice, "its procedural fairness increases the likelihood of substantive justice, or at least tends to alleviate any potential concerns about a lack of systematic substantive justice".[736] He further states that consistent and uniform jurisprudence of the CAS is better than a "potentially conflicting body of international sports law unduly influenced by nationalistic interests through broader judicial review".[737]

As succinctly summarised by Casini, the role of the CAS lies in three main functions:[738]

1) interpreting sports law and, consequently, influencing and conditioning rule-making activity by sporting institutions;

2) contributing to the harmonisation of global sports law;

3) applying general and specific principles of sports law as well as creating the latter.

In particular, this last function is what makes the CAS a unique authority in the area of sport generally and for the development of *lex sportiva* specifically.[739] *Lex sportiva* is indeed very much dependent on the CAS as its prime institutional source[740] and the CAS is interested in the development of *lex sportiva* through its own jurisprudence by aiming at the harmonisation of the judicial rules and principles applied within the world of sport.[741] In fact, the CAS stands behind the creation of *lex sportiva*, in particular through the active use of precedents in its jurisprudence.[742]

4.3.2. Use of precedents in dispute resolution

As in most arbitral rules, the obligation to follow the preceding decisions of other panels is absent from the Code of Sports-related Arbitration. Moreover, sometimes CAS panels specifically mention that previous CAS awards do not have a *stare decisis* effect or any precedential value, and therefore the panels are not bound to follow legal positions expressed therein.[743]

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[736] Mitten, 'The Court of Arbitration for Sport' (n 136) 40. Other authors also pointed out to robust level of fairness of the CAS and its jurisprudence, see Nafziger, 'Defining the Scope and Structure of International Sports Law' (n 263) 20.

[737] Mitten, 'The Court of Arbitration for Sport' (n 136) 41.

[738] Casini, 'The Making of a *Lex Sportiva*' (n 268) 24; see also Foster, '*Lex sportiva* and *Lex ludica*' (n 101) 2.

[739] Nafziger, 'Defining the Scope and Structure of International Sports Law' (n 263) 19; Foster, '*Lex sportiva* and *Lex ludica*' (n 101) 1.

[740] See Foster, 'Is there a global sports law?' (n 264) 44.

[741] See Matthieu Reeb, *Volume II of the CAS Digest of Awards 1998-2000* (Kluwer Law International 2002).

[742] Kaufmann-Kohler (n 138) 365; Annie Bersagel, 'Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field' (2012) 12 (2) Pepperdine Dispute Resolution Law Journal 189.

[743] *Football Association of Serbia v. Union des Associations Européennes de Football (UEFA)*, CAS 2016/A/4602, award dated 24 January 2017 at para 19. See also *Jersey Football Association (JFA) v. Union of European Football Associations (UEFA)*, CAS 2016/A/4787, award dated 28 September 2017 at para 143.

Nevertheless, whilst not having a specific provision with regards to the treatment of previous CAS decisions, in practice CAS panels frequently refer to such jurisprudence by citing CAS case law. For some scholars this explains the success of the CAS.[744] In this respect, CAS Panels' reasonings in *UCI v. Jogert & NCF*, *International Association of Athletics Federations (IAAF) v. USA Track & Field (USATF) & Y* and *Anderson v. IOC* are very illustrative.

UCI v. Jogert & NCF[745] is one of the earliest examples of a CAS Panel being mindful of the value of previous and future CAS jurisprudence for all sport actors, including the CAS itself. Thus, the arbitral tribunal stated that: "[...] CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions *can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes*".[746]

In *International Association of Athletics Federations (IAAF) v. USA Track & Field (USATF) & Y*, the CAS Panel stated that: "In CAS jurisprudence there is no principle of binding precedent, or stare decisis. However, a CAS Panel *will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel*".[747] Thus, the arbitrators explicitly admit that they will analyse previously rendered CAS awards on the same subject matter and base their reasoning accordingly with the aim of reaching a decision that coheres with previous jurisprudence.

In *Anderson v. IOC* the panel went further. In considering the value of previous CAS awards and established principles and legal positions expressed therein, the arbitral tribunal noted that: "[...] although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect."[748] Thus, the CAS panel here asserts that it would not depart from the previously settled positions expressed in CAS awards, except if a party arguing such departure provided sufficient grounds. It seems that in this manner the panel wanted to secure coherence and predictability of CAS jurisprudence by placing much weight on existing case law.

For some, such approach – actively using past precedents, but without obligation to follow them – signals that the CAS does not employ *stare decisis*, but *jurisprudence constante,* which is a civil law doctrine pursuant to which a series of previous decisions applying a particular

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[744] Adam Beach, 'The Court of Arbitration for Sport – a Supreme Court for the Sports World?' (The Student Journal of Law, July 2012) <https://sites.google.com/site/349924e64e68f035/issue-4/-the-court-of-arbitration-for-sport-a-supreme-court-for-the-sports-world> accessed 20 September 2019.

[745] *UCI v. Jogert & NCF, CAS 97/176*, award dated 15 January 1998.

[746] ibid at para 40, emphasis added.

[747] *International Association of Athletics Federations (IAAF) v. USA Track & Field (USATF) & Y, CAS 2004/A/628*, award dated 28 June 2004 at para 19, emphasis added.

[748] *Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Committee (IOC),* CAS 2008/A/1545, award dated 16 July 2010 at para 55.

legal principle or rule is highly persuasive but not decisive in subsequent cases dealing with similar or identical issues of law.[749] Irrespective of the precise qualification of this phenomenon, the fact is that past precedents do indeed play an important role in the CAS current practice.[750]

It is notable that a study showed that from 1986 to 2003 only one award in six cited prior cases.[751] However, according to some evidence, since 2003 nearly every award has contained at least one reference to earlier CAS awards, except for rare instances when a panel finds the applicable sporting codes already sufficiently comprehensive.[752]

This is confirmed by my analisis CAS awards published in 2017 (the latest available period at the time of writing). The CAS database includes 27 awards marked as rendered in 2017 (although two of these awards were actually rendered at the beginning of 2018).[753] Out of these 27 awards rendered in this period only four of the awards did not cite any previous CAS case law, meaning that more than 85% of all rendered awards in 2017 refer to previous CAS panels' decisions.[754]

However, upon a closer look at these awards it is relatively easy to identify the reasons why arbitral panels decided not to refer to any previous jurisprudence. For example, the matter in *Danis Zaripov v. International Ice Hockey Federation (IIHF)*[755] concerned ratification of a settlement agreement and its subsequent incorporation in a consent award. Thus, it was a procedural matter only, which did not require the sole arbitrator to refer to previous case law. In *Rochell G D Woodson v. Liberia Football Association (LFA)*[756] the issue concerned the expulsion of a member from the executive committee of a national football federation. The sole arbitrator reached his decision on the basis of an analysis and interpretation of the relevant provisions of Liberia Football Association Statutes. Lastly, *Chunhong Liu v. International Olympic Committee (IOC)*[757] and *Lei Cao v. International Olympic Committee (IOC)*[758] represent two almost identical cases of the use of doping substances by Chinese weightlifters. The matters were also heard on the same day and by the same arbitrator, who referred only to the WADA Code and the WADA's Prohibited List in order to decide the dispute.

In contrast, the remaining 23 CAS awards rendered in 2017 extensively relied on previous CAS jurisprudence. For example, in *Debreceni Vasutas Sport Club (DVSC) v. Nenad*

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[749] See Bersagel (n 742); Guillaume (n 714).
[750] Mitten, 'The Court of Arbitration for Sport' (n 136) 27.
[751] As reported in Kaufmann-Kohler (n 138) 365 on the basis of Reeb (n 741).
[752] As reported in Kaufmann-Kohler (n 138) 365; Bersagel (n 742) 199-200.
[753] See *Sporting Clube de Braga v. Club Dynamo Kyiv & Gerson Alencar de Lima Junior*, CAS 2017/A/5227, award dated 8 March 2018 and *Debreceni Vasutas Sport Club (DVSC) v. Nenad Novakovic*, CAS 2017/A/5111, award dated 16 January 2018.
[754] See details in Appendix I. Awards published by the CAS in 2017.
[755] *Danis Zaripov v. International Ice Hockey Federation (IIHF)*, CAS 2017/A/5280, consent award dated 21 November 2017.
[756] *Rochell G D Woodson v. Liberia Football Association (LFA)*, CAS 2017/A/4979, award dated 7 August 2017.
[757] *Chunhong Liu v. International Olympic Committee (IOC)*, CAS 2017/A/4973, award dated 31 July 2017.
[758] *Lei Cao v. International Olympic Committee (IOC)*, CAS 2017/A/4974, award dated 31 July 2017.

Novakovic[759] the arbitral tribunal cited 21 previously rendered CAS awards in order to support its reasoning.

Awards from 2016 cases represent a more complete example. There are 167 awards available on the CAS website from this period (such a significant number arises from the Rio Olympic Games and a doping scandal involving some Russian sportsmen). Out of these 167 awards nine awards were rendered in French and cannot be used for this analysis due to the author's lack of French language skills, thus leaving 158 arbitral awards for review.[760] Upon analysing these awards it is revealed that in 33 instances neither a party argued for nor a panel relied upon a previously rendered CAS arbitral award. Thus, nearly 80% of all CAS awards in 2016 referred to previous case law.

In addition, it is worth mentioning that 17 of these 33 awards concerned usage of doping by sportsmen and were resolved purely on the basis of the WADA code provisions.[761] Also, 12 of these 33 awards were rendered during the Olympic Games in Rio under the expedited procedure.

Furthermore, the above analysis also demonstrates that the parties themselves often rely on previous CAS jurisprudence in order to present their arguments in an arbitration process. In *International Ski Federation (FIS) v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF)* and *Therese Johaug v. NIF*[762] the parties referred to nine previous CAS awards; in *World Anti-Doping Agency (WADA) v. Confederação Brasileira de Futebol (CBF) & Olivio Aparecido da Costa*[763] – to 12; and in *Belarus Canoe Association (BCA) & Belarusian Senior Men's Canoe and Kayak team members v. International Canoe Federation (ICF)* – to 15.[764] Often when a party presents a previous CAS award as an additional argument, a CAS panel analyses in detail each such past case with regards to its relevance and appropriateness in the matter under consideration.[765]

Notably, while analysing the awards from 2016 and 2017 the author did not come across any instance when a panel expressly decided to take a different position from the previously established position in one of the CAS awards (although there were instances wherein a panel

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[759] *Debreceni Vasutas Sport Club (DVSC) v. Nenad Novakovic*, CAS 2017/A/5111, award dated 16 January 2018.

[760] See details in Appendix II. Awards published by the CAS in 2016.

[761] Which to some extent signifies the success of the WADA Code as a set of sport-specific rules for antidoping which can be interpreted without recourse to national law, see Paul David, *A Guide to the World Anti-Doping Code: The Fight for the Spirit of Sport* (3 edn, Cambridge University Press 2017) x.

[762] *International Ski Federation (FIS) v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF) and Therese Johaug v. NIF*, CAS 2017/A/5015 & CAS 2017/A/5110, award dated 21 August 2017.

[763] *World Anti-Doping Agency (WADA) v. Confederação Brasileira de Futebol (CBF) & Olivio Aparecido da Costa*, CAS 2017/A/5139, award dated 7 December 2017.

[764] *Belarus Canoe Association (BCA) & Belarusian Senior Men's Canoe and Kayak team members v. International Canoe Federation (ICF)*, CAS 2016/A/4708, award dated 23 January 2017.

[765] See, for example, *Ittihad FC, Saudi Arabia v. Etoile Sportive du Sahel*, CAS 2017/A/5233, award dated 22 December 2017; *Samir Nasri v. Union des Associations Européennes de Football (UEFA)*, CAS 2017/A/5061, award dated 15 December 2017; *Lisa Christina Nemec v. Croatian Institute for Toxicology and Anti-Doping (CITA) & International Association of Athletics Federations (IAAF)*, CAS 2016/A/4458, award dated 27 April 2017; *FC Porto v. Hellas Verona FC & Club Cerro Porteño*, CAS 2016/A/4519, award dated 26 January 2017, etc.

went into a detailed description as to why a certain principle expressed in previous case law was not applicable in the discussed situation or did not constitute a common understanding due to some specific circumstances,[766] or because a cited case referred to the previous rule which has been amended since the time of the award).[767] At the same time, when analysing some CAS awards before 2016 Mitten identified a few conflicting awards.[768] This lack of consistency, which is an essential element of fairness, was noted by some commentators as a potential obstacle to the development of *lex sportiva* on a global basis.[769]

4.3.3. Publication of rendered decisions

The CAS actively practices publication of its decisions. Indeed, it seems that it is no coincidence that a wider accessibility of CAS awards has resulted in a greater level of awareness, both by academics and practitioners, of CAS jurisprudence, which in turn has sparked a significant legal analysis of the CAS basis for its decision-making and expressed legal opinions.

However, whilst the practice of publishing is a driving force of *lex sportiva*, the unclear basis for publication of only a limited number of awards creates obstacles for its consistency.

The Code of Sports-related Arbitration[770] provides for different confidentiality provisions applicable in the Ordinary Arbitration Procedure and the Appeal Arbitration Procedure. In the former procedure, awards are not made public unless all parties agree or the Division President so decides.[771] Allegedly, this presumption of confidentiality is enforced because the Ordinary Arbitration Procedure is predominantly used for resolving commercial disputes in the area of sport,[772] *i.e.* protecting their commercial interests. Thus, the default rule of confidentiality of the awards effectively hides a large chunk of sports disputes which potentially may be valuable for *lex sportiva* development, especially in its commercial aspects.

The Code of Sports-related Arbitration does not provide for any specific grounds under which the Division President may rule that an award be made public, thus making his/her decision purely discretionary. There is also no guidance as to whether the Division President can overturn the parties' decision on confidentiality. In any event, according to some limited

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[766] *Football Association of Serbia v. Union des Associations Européennes de Football (UEFA)*, CAS 2016/A/4602, award dated 24 January 2017 at para 119.

[767] *Samir Nasri v. Union des Associations Européennes de Football (UEFA)*, CAS 2017/A/5061, award dated 15 December 2017 at para 49.

[768] Mitten, 'The Court of Arbitration for Sport' (n 136) 34; see *Oliviera v. USADA,* CAS 2010/A/2107, award dated 6 December 2010 and *Querimaj v. IWF,* CAS 2012/A/2822, award dated 12 September 2012 versus *Foggo v. NRL,* CAS A2/2011, award dated 3 May 2011; *ITF v. Kutrovsky,* CAS 2012/A/2804, award dated 3 October 2012; *Heart of Midlothian v. Webster & Wigan Athletic FC,* CAS 2007/A/1298-1300, award dated 30 October 2008 versus *Shakhtar Donetsk v. Matuzalem & Real Zaragoza SAD,* CAS 2008/A/1519-1520, award dated 19 May 2009.

[769] Nafziger, 'Defining the Scope and Structure of International Sports Law' (n 263) 21; Ian Blackshaw, 'Towards a '*Lex Sportiva*'' (2011) 3-4 The International Sports Law Journal 140, 144.

[770] As of 1 January 2017.

[771] Article R43.

[772] Saverio Spera, 'Time for Transparency at the Court of Arbitration for Sport' (Asser International Sports Law Blog, 31 January 2017) <https://www.asser.nl/SportsLaw/Blog/post/transparency-at-the-court-of-arbitration-for-sport-by-saverio-spera> accessed 20 September 2019.

evidence, such instances have been extremely rare.[773]

In the Appeal Arbitration Procedure the presumption is that the award, a summary and/or a press release setting forth the results of the arbitral proceedings shall be made public by the CAS, unless both parties agree that they should remain confidential.[774] The different default confidentiality rule in the Appeal Procedure is backed by the fact that appeals concern mostly disciplinary decisions that are of interest to the public.[775]

Unfortunately, whilst appearing useful (at least in relation to the Appeal Arbitration Procedure), in practice the CAS often fails to implement the respective provisions swiftly and transparently.

Saverio Spera compared the number of appeals submitted to the CAS with the number of awards actually published on its website for the period from 1995-2013.[776] Although Spera is mindful of certain limitations of the comparison due to the lack of precision of the CAS's statistics,[777] his findings are striking. Notably, whilst the workload of the CAS has been steadily increasing, the number of published awards has been diminishing and from 2009 to 2013 stood at a disappointing average rate of 17.5%. Thus, such rate raises some significant concerns as to whether this low amount of published arbitral awards can possibly be regarded as sufficient in order to create a body of allegedly universal sports law.

I decided to continue an examination of the number of published CAS awards during the 2014-2016 period using the same methodology employed by Spera by referring to official CAS statistics.[778] In the process of doing this I also checked the accuracy of data provided by Spera. Surprisingly, my research revealed a completely different picture.

The data used by Spera is correct for the most part, except for the period from 2010 to 2013. In this period the number of published awards substantially differs from the one indicated by Spera. This is especially evident for years 2012 and 2013 where actual numbers of the published appeal awards are double those provided by Spera. Consequently, this results in the percentage rate of published awards being considerably higher than indicated by Spera, making the average rate for 2009-2013 27% instead of 17.5%.

Of course, this is a much more promising result. Moreover, from the respective analysis of the period from 2014 to 2016 it is clear that this trend is likely to continue. In fact, having regard to Spera's approach in calculating the last 5 years average percentage rate, in 2012-2016 the

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[773] Report by the Committee on International Commercial Disputes of the Association of the Bar of the City of New York, 'Publication of International Arbitration Awards and Decisions' (February 2014) 6.
[774] Article R59.
[775] Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 588.
[776] Spera (n 772).
[777] As he explains, in the statistics section of the CAS website it is possible to retrieve only data referring to the Appeals submitted every year but not to the appeal awards rendered. Therefore, yearly comparison cannot take fully into account the temporary shift between the submission of the case and the rendering of the decision (as well as the limited number of cases which were withdrawn).
[778] Court of Arbitration for Sport (n 722).

average percentage rate of published appeal awards amounted to 36.7%, *i.e.* more than one in three appeals were published.

Table 1. Appeal awards published on the CAS website: comparison of the analysis conducted by Saverio Spera in 2017 and Andrii Zharikov in 2018

Year	Appeals submitted to the CAS	Saverio Spera (2017): Appeal awards published	Andrii Zharikov (2018): Appeal awards published	Saverio Spera (2017): Percentage of published appeal awards	Andrii Zharikov (2018): Percentage of published appeal awards
2010	244	41	42	16.8%	17.2%
2011	294	45	62	15%	21.1%
2012	301	61	120	20%	39.9%
2013	349*	66	140	19%	40.1%
2014	349	n/a	143	n/a	41%
2015	410	n/a	148	n/a	36.1%
2016	458	n/a	121	n/a	26.4%

* 347 according to data used by Saverio Spera (2017)

Comparing my data with the data produced by Spera one can easily notice that his numbers of published awards are correct up until the last few years of his analysis. Obviously, it would be unfair and inappropriate to assume that he was careless in his calculations and omitted more than half of the awards. It seems that the problem here is not with the data, but with the slow process of publication of the awards. This is also confirmed by the fact that at the time of writing the percentage rate for 2016 is considerably lower than in 2015 and 2014. Moreover, for 2017 only 26 CAS appeal awards have been published to date.

Furthermore, the CAS website contains a separate section titled 'recent decisions'.[779] Astonishingly, it includes some awards from 2015 and 2016, which can by no means be regarded as recent.

Thus, the delay in publishing the awards may extend up to five years or even more in some instances. In addition, it is not clear on what basis the CAS decides when and which award shall be published. Consequently, this significantly undermines the predictability of CAS jurisprudence: it is not sufficient for the awards merely to be published, after they are rendered they need to be *promptly* published.[780] Failure to do so may result in a lack of coherence in the CAS decision-making process and attract criticism of the apparent transparency of its

[779] CAS, 'Recent Decisions' (*CAS*, [no date]) <https://www.tas-cas.org/en/jurisprudence/recent-decisions.html> accessed 20 November 2018.
[780] Spera (n 772).

activities.

This is especially relevant in the context of the value of previous CAS jurisprudence and the treatment of past rendered awards by future panels. As was shown above, more than 80% of the published CAS awards referred to CAS case law. Any significant delay in publication of rendered awards inevitably results in substantial disadvantage to some parties who may not be aware of most recent CAS practice. In some instances, awareness about recent CAS jurisprudence may be a decisive factor for a party with regards to the filing of a claim with the CAS.

Furthermore, Rigozzi made an observation that, unfortunately, some CAS decisions had been based on solutions adopted in previous awards that had not at that time been published.[781] In addition, he also found that some awards disappeared from the CAS website shortly after their publication.[782] This not only undermines consistency and coherence of CAS jurisprudence, but also provides an additional advantage for those, such as counsel or arbitrators, who for some reason are aware of the results and legal positions expressed in the unpublished awards,[783] thereby resulting in unfair process.

4.3.4. Reliance on existing and development of new industry-specific principles, customs, usages and practices through dispute resolution

Pursuant to Article R58 of the Code, a CAS panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that a CAS panel deems appropriate. Thus, the starting point for a CAS panel is to consider the applicable rules of a relevant sports federation, sometimes the IOC and WADA in doping cases. National law plays a subsidiary role and is used if the parties explicitly decided so or, in disputes involving any sport governing bodies, if there is a need to refer to the law of the country where such governing body is located. Naturally, since the CAS is based in Switzerland, many cases involve Swiss law.

However, the abovementioned provision of Article R58 empowers a CAS panel to apply such rules of law as it deems appropriate. As in the case of many arbitration rules, this wording has been construed as a green light for reference to any non-national body of law. Thus, the CAS has successfully used it to develop and apply its own set of principles named as *lex sportiva*.

Indeed, the CAS often refers to the concept of *lex sportiva* in its jurisprudence. At the same time, deeper analysis of available published awards reveals that the concept of *lex sportiva* is

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[781] Antonio Rigozzi, *l'Arbitrage Internationale en Matiére de Sport* (Helbing & Lichtenhahn 2005) 640 as cited in Spera (n 772).
[782] ibid.
[783] ibid.

treated and applied inconsistently by various CAS panels.

Based on the CAS database of published arbitral awards it was possible to identify 26 instances wherein the term '*lex sportiva*' was used either by a panel or by a party in its submissions.[784] Furthermore, there have been approximately a dozen awards which referred to '*lex ludica*'[785] and/or '*lex mercatoria*'[786] (sometimes these references were made on a par with the reference to *lex sportiva* in the same awards).[787]

In fact, there was no mention of *lex sportiva* when a CAS award recognised, for the first time, that sport had developed a specific set of unwritten legal principles. In 1999 the CAS panel in *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)*[788] stated that whilst the sporting community must abide by and respect general principles of law and laws of the countries and statutes and regulations of international sporting federations, "[s]ports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of *lex mercatoria* for sports or, so to speak, a *lex ludica* – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national «public policy» («ordre public») provision applicable to a given case."[789] Thus, at the very roots of recognising the specific unwritten principles applicable in the area of sport the CAS identified that such legal body, *i.e. lex sportiva*, is: a) comparable to *lex mercatoria* in the specific area, *i.e.* constitutes its branch; b) being developed and consolidated through arbitration; c) exists without authorisation from national or sporting bodies and does not require any formalisation; and d) limited only by the ordre public.

The panel in *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)* went further by stating that the principle of prohibition of arbitrary or unreasonable rules

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[784] See details in Appendix III. Reference to the term "lex sportiva" in the CAS awards.

[785] See details in Appendix IV. Reference to the term "lex ludica" in the CAS awards.

[786] See details in Appendix V. Reference to the term "lex mercatoria" in the CAS awards.

[787] With regards to *lex ludica*, there has been some academic debate about the scope of this term and its correlation with *lex sportiva*. Thus, Foster argues that *lex ludica* represents a concept consisting of the rules of the game, *i.e.* sporting matters that are outside legal intervention and not suitable for arbitration by the CAS due to them being solely the responsibility of match officials. In Foster's view, *lex ludica* exists alongside *lex sportiva* (see Foster, '*Lex sportiva* and *Lex ludica*' (n 101)). On the contrary, Siekmann views *lex ludica* as a subspecies of *lex sportiva* responsible for its private part, including, but not limited to, the rules of the game (see Siekmann, *Introduction to International and European Sports Law* (n 262)). However, it seems that both authors theorise about more than rely on available case law. In essence, there are CAS awards which include principles not connected to the rules of the game in the concept of *lex ludica* (see *Artur Taymazov v. International Olympic Committee (IOC)*, CAS 2017/A/5099, award dated 4 December 2017; *International Skating Union (ISU) v. Alexandra Malkova, Russian Skating Union (RSU) & Russian Anti-Doping Agency (RUSADA)*, CAS 2016/A/4840, award dated 6 November 2017; *Amke Stroman v. Fédération Equestre Internationale (FEI)*, CAS 2013/A/3318, award dated 14 March 2014) as well as awards in which no distinction is drawn between *lex sportiva* and *lex ludica* (see *Mohamed Bin Hammam v. Fédération Internationale de Football Association (FIFA)*, CAS 2011/A/2625, award dated 19 July 2012). Looking at CAS case law it seems that in the eyes of CAS panels *lex ludica* and *lex sportiva* are synonyms and the preferred usage of one term over another is a simple matter of nomenclature: there is no such Latin word as 'sportiva', but the word 'ludus' in the Latin means 'sport' (see 'Latin Dictionary and Grammar Resources' (*LatDict*, [no date]) <http://latin-dictionary.net/search/latin/ludus> accessed 20 September 2019).

[788] *AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)*, CAS 98/200, award dated 20 August 1999 at para 156.

[789] ibid.

and measures can be deemed as a part of such *lex ludica*.[790] In addition, the panel also stated that *lex ludica* also consisted of general principles of law drawn from a comparative or common denominator from various domestic legal systems.

In 2003 three CAS awards were rendered which significantly enhanced the understanding of this special non-national sport body of law. Firstly, in *WCM-GP Limited v. Fédération Internationale Motocycliste (FIM)* the appellant argued that interpretation of a certain provision of the Road Racing World Championship Grand Prix Regulations should be made through the prism of "the sporting *lex mercatoria*" and in particular in accordance with its three principles, namely the principles of legal certainty, the *contra proferentem* rule and the principle of proportionality.[791] Whilst not arguing against the existence of such sporting *lex mercatoria* or the abovementioned three principles as a constituent part of it, the panel referred to Swiss law and stated that such principles are only employed if there is ambiguity and that, therefore, no clear meaning could be drawn from an interpretation based on the letter and the spirit of the law.[792] Thus, the panel rejected the application of the sporting *lex mercatoria*, perhaps seeing that in this case it was limited by public order.

Secondly, in *the Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*[793] the panel again emphasised that there were specific legal principles that were applicable as "[...] a type of *lex mercatoria* for sports regardless of their explicit presence in the applicable UEFA or FIFA Statutes". In this case the panel referred to *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)* and specified the principle of fairness as one of these specific sport principles. Notably, as in previous discussed case, there was no mention of *lex ludica*.

A few months later, the CAS issued its decision in *Canadian Olympic Committee (COC) & Beckie Scott v. International Olympic Committee (IOC)*.[794] This decision contained the first reference to *lex sportiva*. In this case the panel explicitly equated *lex sportiva* to CAS case law, the Olympic Charter and the Olympic Movement Anti-Doping Code, noting that the parties clearly made their choice of law when they based their arguments on the respective provisions of these acts as well as CAS jurisprudence relating to doping cases. The panel stated that "CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed part of an emerging "*lex sportiva*". Since CAS jurisprudence is largely based on a variety of sports regulations, the parties' reliance on CAS precedents in their pleadings amounts to the

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[790] ibid.

[791] *WCM-GP Limited v. Fédération Internationale Motocycliste (FIM)*, CAS 2003/A/461 & 471 & 473, award dated 19 August 2003 at page 5.

[792] ibid at para 36.

[793] *The Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, CAS 2002/O/410, award dated 7 October 2003 at para 4.

[794] *Canadian Olympic Committee (COC) & Beckie Scott v. International Olympic Committee (IOC)*, CAS 2002/O/373, award dated 18 December 2003.

choice of that *specific body of case law* encompassing certain general principles derived from and applicable to sports regulations".[795]

Interestingly, the panel referred to an emerging *lex sportiva*, even though it acknowledged that the CAS had already developed and refined a number of principles of sports law. Despite being characterised as simply an 'emerging' body of law (*i.e.* incomplete), *lex sportiva* was nonetheless considered as appropriate and effective to the governance of the parties' relations.

However, in the next case, namely *Yang Tae Young & Korean Olympic Committee (KOC) v. International Gymnastics Federation (FIG)*, the panel took a view that *lex sportiva*, which in this particular case consisted of and was limited to CAS jurisprudence on field of play decisions, should be used on par with the applicable regulatory instruments issued by the International Gymnastics Federation as governing law,[796] *i.e.* in essence providing that such International Gymnastics Federation instruments were not part of *lex sportiva*. This case considered an erroneous decision of a judge which resulted in a sportsman being awarded a bronze instead of a gold medal. In order to justify and prove its position, the CAS panel, *inter alia*, cited a number of previous CAS awards which it equated to *lex sportiva*.

The CAS award in *Apollon Kalamarias F.C. v. Davidson Oliveira Morais*[797] represents one of the early instances (if not the first) when general principles of law applicable to sport were used to override national law. Here the matter concerned a standard form of employment contract made pursuant to Article 90 of the Greek Sports Act 1999 (Law 2725/99). In particular, this standard form contract included a unilateral right of annual renewal by the football club for up to four years. According to the Greek Football Association, the employment agreement and this specific provision about annual renewal were valid under Greek law. However, the CAS, while deciding that Greek law was the governing law in this case, took the view that such law was inconsistent with the spirit of general legal principles, in particular freedom of movement in the context of players, whose careers tend to be very short in comparison to other professions. Therefore, such general principles should prevail and the provision regarding a unilateral right of annual renewal was not valid. In reaching these conclusions the CAS panel referred to *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)* noting that such approach, *i.e.* the prevalence of general legal principles over any national regulatory law regime, "reflects the growth of a *lex sportiva* or a *lex judica*".[798]

Whilst there could be no doubts as to the significance of the *Apollon Kalamarias F.C. v. Davidson Oliveira Morais* award, some questions arise with regards to the terminology used

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[795] ibid at para 14, emphasis added.
[796] *Yang Tae Young & Korean Olympic Committee (KOC) v. International Gymnastics Federation (FIG)*, CAS 2004/A/704, award dated 21 October 2004 at para 2.
[797] *Apollon Kalamarias F.C. v. Davidson Oliveira Morais*, CAS 2004/A/678, award dated 20 May 2005.
[798] ibid at para 25.

by the panel. Apart from introducing a completely new term ('*lex judica*', which is probably just a variation of the term '*lex ludica*' used in previous awards), one may wonder about the correlation of this term with *lex sportiva*. Unfortunately, from the wording used in the award it is not possible to identify whether the panel envisaged *lex judica* and *lex sportiva* to be synonyms, or if it was not certain about the limits of each and therefore used both.

To complicate things further, the advisory opinion in *Fédération Internationale de Football Association (FIFA) & World Antidoping Agency (WADA)*,[799] which concerned the issues about enforceability of the WADA Code under Swiss law and its implementation by FIFA as a Swiss-based association, stipulated a completely different approach towards *lex sportiva*. In analysing the issue as to whether there are any mandatory provisions which prevent FIFA from adopting the WADA Code in its entirety and implementing different sanctions taking into account factors specific to football and generally recognised principles of law, the Panel stipulated that general principles of law were part of Swiss jurisprudence and their roots could be found in the branches of Swiss law. Thus, the panel placed much emphasis on a national regulatory regime, thus providing that general principles of law depended on recognition by such regime. Furthermore, the panel stated that it was "not prepared to take refuge in such uncertain concepts as that of a "*lex sportiva*", as has been advocated by various authors. The exact content and the boundaries of the concept of a *lex sportiva* are still far too vague and uncertain to enable it to be used to determine the specific rights and obligations of sports associations towards athletes."[800]

This is despite the fact that a year earlier the panel in *Federacio Catalana de Patinatge (FCP) c. International Roller Sports Federation (FIRS)* specifically referred to the principles of *lex sportiva* in the manner they were used in previous CAS jurisprudence as the governing law between FCP and FIRS, and that the latter had an obligation to respect these principles with regard to FCP's procedural rights.[801]

What is illustrated by this brief chronological selection of CAS awards is the absence of any common understanding of the concept of a special non-nationally developed body of law applicable to sport, its contents, boundaries, correlation with national law, as well as its very existence. Further confusion was made due to the usage of different terminology with regards

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[799] *Fédération Internationale de Football Association (FIFA) & World Antidoping Agency (WADA)*, CAS 2005/C/976 & 986, advisory opinion dated 21 April 2006.
[800] ibid at para 124.
[801] *Federacio Catalana de Patinatge (FCP) c. International Roller Sports Federation (FIRS)*, TAS 2004/A/776, award dated 15 July 2005 at paras 16, 24 and 46.

to the allegedly same concept.[802]

At the same time, one may also notice that from the outset the CAS panels saw such special sporting body of law as a part of *lex mercatoria*. Only at a later stage was the concept of *lex sportiva* (and, to a lesser extent, lex ludica) more widely used in CAS jurisprudence. Nonetheless, some CAS panels still occasionally make reference to *lex mercatoria*, mostly as a governing law in sports commercial relations, such as transfer of players between clubs.[803]

In addition, it seems that the position of the CAS has changed dramatically since its 2006 advisory opinion in *Fédération Internationale de Football Association (FIFA) & World Antidoping Agency (WADA)* in which it was not willing to accept the existence of *lex sportiva* due to its vague contents and boundaries. Since then the CAS has not only confirmed that *lex sportiva* can be used as a governing law under the Swiss Federal Private International Law Act,[804] but has also concentrated on shaping the concept via elaboration of various new principles[805] and ensuring consistency of *lex sportiva*.[806] Consequently, such gradual identification of the contents of *lex sportiva* has resulted in another notable development: the parties to CAS cases have started to rely on *lex sportiva* in presenting their arguments.

The first such case, as identified by the author, seems to come from 2012, when Mohamed Bin Hammam, a former candidate for the FIFA Presidency, appealed FIFA's decision on his

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[802] Even though the term '*lex ludica*' has been used less frequently than '*lex sportiva*', I have found several CAS awards referring to *lex ludica*, some of which represent the latest available instances of CAS jurisprudence. See *Artur Taymazov v. International Olympic Committee (IOC)*, CAS 2017/A/5099, award dated 4 December 2017 at para 45; *International Skating Union (ISU) v. Alexandra Malkova, Russian Skating Union (RSU) & Russian Anti-Doping Agency (RUSADA)*, CAS 2016/A/4840, award dated 6 November 2017 at para 44; *Amke Stroman v. Fédération Equestre Internationale (FEI)*, CAS 2013/A/3318, award dated 14 March 2014 at para 79; *Doping Control Centre, Universiti Sains Malaysia v. World Anti-Doping Agency (WADA)*, CAS 2010/A/2162, award dated 15 June 2011 at para 9.

[803] *Panionios GSS FC v. Paraná Clube*, CAS 2012/A/2908, award dated 9 April 2013 at para 132: "In view of the law applicable, the Panel remarks that the issue as to which club the Player joined immediately after leaving Paraná must be determined within the meaning of FIFA's express administrative procedures which govern the loan or definite transfer of professionals between associations, as well as the unwritten, yet adopted laws, practices or usages common to clubs and players in the football market for the transfer of players, the so called *lex mercatoria*"; *Kuwait Sporting Club v. Z. & FIFA*, CAS 2008/A/1593, award dated 30 December 2008 at para 18: "It is, and has always been the buying club's duty to ensure for itself that the player they intend to contract is in good physical condition. The *lex mercatoria* between clubs and players has always seen buying clubs conducting medical examinations on players before concluding any employment contract with the prospective player." See also references to *lex mercatoria* as the governing law in *Football Federation Islamic Republic of Iran (IRIFF) v. Fédération Internationale de Football Association (FIFA)*, CAS 2008/A/1708, award dated 4 November 2009 at para 51; *Club Atlético Peñarol c. Carlos Heber Bueno Suarez, Cristian Gabriel Rodriguez Barrotti & Paris Saint-Germain*, TAS 2005/A/983 & 984, award dated 12 July 2006 at para 22.

[804] *Laszlo Sepsi v. FC Timisoara*, CAS 2011/A/2584, award dated 25 January 2012 at para 66; *Federación Española de Bolos (FEB) c. Fédération Internationale des Quilleurs (FIQ) & Federació Catalana de Bitlles i Bowling (FCBB)*, TAS 2007/A/1424, award dated 23 April 2008 at paras 12, 17.

[805] See, for example, *Boxing Australia v/AIBA*, CAS 2008/O/1455, award dated 16 April 2008 at para 42; *Doping Control Centre, Universiti Sains Malaysia v. World Anti-Doping Agency (WADA)*, CAS 2010/A/2162, award dated 15 June 2011 at para 9; *Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Committee (IOC)*, CAS 2008/A/1545, award dated 16 July 2010 at paras 62-74. Interestingly, in this award the panel analysed CAS case law and decided that whilst there is a theoretical possibility that an established principle of *lex sportiva* might serve as a legal basis to impose a sanction on an athlete, no such principle has emerged and crystallised to the effect that a team should inevitably be disqualified because one of its members was doped during a competition.

[806] See, for example, *World Anti-Doping Agency (WADA) v. Comitato Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi*, CAS 2017/A/4962, award dated 3 August 2017 at para 36; *World Anti-Doping Agency (WADA) v. International Weightlifting Federation (IWF) & Yenny Fernanda Alvarez Caicedo*, CAS 2016/A/4377, award dated 29 June 2016 at para 46.

lifetime ban from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) due to his alleged involvement in bribery.[807] As one of his arguments, he asserted that whilst FIFA's decision concerned his civil rights, it was not based on the principle of due process as per standards guaranteed by the European Convention on Human Rights (Article 6). By disregarding such principle, FIFA, according to Mr. Bin Hammam, had committed "a grave violation of the principles of the *lex sportiva* which CAS jurisprudence demands that they apply", because CAS jurisprudence had long recognised that the standards set forth by the European Convention on Human Rights form an integral part of "the *lex sportiva* or *lex ludica* recognized by the CAS".[808] The panel did not go into much detail when analysing whether such principle actually formed part of *lex sportiva*, simply noting that due process was a matter of natural justice, whether or not it was reflected in Article 6 of the European Convention on Human Rights, or Swiss law, or some other applicable rules or principles.[809] However, it agreed that FIFA's decision was made in violation of due process and therefore annulled it.[810]

Following the award in *Mohamed Bin Hammam v. Fédération Internationale de Football Association (FIFA)* reliance of parties on *lex sportiva* has grown exponentially. Thus, within a relatively short period from mid-2014 to early 2017 there were 10 instances wherein the parties referred to the principles of *lex sportiva* or their violation in their submissions to the CAS.[811] There are likely to be more such instances, but due to the slow process of awards publication by the CAS it is not possible to determine the exact numbers. In particular, such reliance on *lex sportiva* signifies the importance allocated by the parties to this non-nationally developed body of law and their trust that reference to it will help them to succeed in the case.

Thus, *lex sportiva* has not only a strong theoretical basis, but, perhaps more importantly, has widespread practical application in dispute resolution. Apart from certain specific aspects and inconsistencies, the CAS appears to have helpfully provided some elaboration of *lex sportiva*

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[807] *Mohamed Bin Hammam v. Fédération Internationale de Football Association (FIFA)*, CAS 2011/A/2625, award dated 19 July 2012.

[808] ibid at para 84.

[809] ibid at para 162.

[810] The panel noted that while this decision was annulled, FIFA is free to re-open the case in order to complete the factual background properly and to determine if Mr. Bin Hammam has committed any violation, see ibid at para 208. The FIFA Ethics Committee initiated two other investigations, which resulted in another life ban for Mr. Bin Hammam, who had resigned from FIFA even before these new investigations were concluded, see 'Mohamed Bin Hammam resigns from football, banned for life' (*FIFA*, 12 December 2012) <https://www.fifa.com/governance/news/y=2012/m=12/news=mohamed-bin-hammam-resigns-from-football-banned-for-life-1973422.html > accessed 20 November 2018.

[811] *Club Kabuscorp do Palanca v. Rivaldo Vitor Borba Ferreira & Fédération Internationale de Football Association (FIFA)*, CAS 2015/A/4271, award dated 26 January 2017; *Al Jazira FSC v. FC Lokomotiv*, CAS 2016/A/4567, award dated 9 November 2016; *Russian Olympic Committee (ROC), Lyukman Adams et al. v. International Association of Athletics Federations (IAAF)*, CAS 2016/O/4684, award dated 10 October 2016; *Al-Gharafa S.C. v. F.C. Steaua Bucuresti & Fédération Internationale de Football Association (FIFA)*, CAS 2015/A/4232, award dated 14 June 2016; *Gabriel Fernando Atz v. PFC Chernomorets Burgas*, CAS 2015/A/4042, award dated 23 December 2015; *Real Federación Española de Fútbol (RFEF) v. Fédération Internationale de Football Association (FIFA)*, CAS 2014/A/3813, award dated 27 November 2015; *Club Promotora del Pachuca S.A. de C.V. v. Facundo Gabriel Coria & Fédération Internationale de Football Association (FIFA)*, CAS 2014/A/3643, award dated 5 June 2015; *Carmelo Enrique Valencia Chaverra v. Ulsan Hyundai Football Club*, CAS 2014/A/3626, award dated 23 April 2015; *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA)*, CAS 2013/A/3411, award dated 9 May 2014; *Abdelali Boussaboun v. Al-Nasr S.C.*, CAS 2013/A/3354, award dated 30 September 2014.

principles. For some scholars such initiative on the part of the CAS in the development of *lex sportiva* has signified that *lex sportiva* itself is limited solely to CAS jurisprudence.[812] While being considered as a rather limited approach towards *lex sportiva* which excludes the role of the IOC, WADA and international sporting federations in the development of transnational sporting regulations, such a point of view also has some significant backing. For example, from my analysis of CAS awards I have observed that when references are made to previous CAS case law, frequently CAS jurisprudence is characterised by such adjectives as "standing",[813] "consistent",[814] "constant"[815] and "existing".[816] Notably, exactly the same or very similar adjectives are also added to *lex sportiva* when it is discussed by arbitral panels or parties.[817]

In any event, no matter the presence of unclear theoretical borders of *lex sportiva*, extensive reliance on past CAS jurisprudence both by arbitral panels and parties involved, frequent recourse to *lex sportiva* and its principles and wide dissemination of case law through publication of awards serves as highly fertile ground for the growth and further development of *lex sportiva* as a non-nationally developed body of law for sport-related matters. Furthermore, states respect the CAS and its jurisprudence (thus support the existence of the *lex sportiva* concept), which is evidenced, *inter alia*, by the fact that for the most part national courts do not challenge CAS awards. There have been around 30 challenges brought against CAS awards to the Swiss Federal Court, but only one such challenge has been successful.[818] Challenges to CAS awards brought to national courts in other jurisdictions have also experienced little

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[812] Nafziger, 'Defining the Scope and Structure of International Sports Law' (n 263) 14; Siekmann, *Introduction to International and European Sports Law* (n 262) 8-9. However, see criticism and danger of such approaches in Valero (n 268) 4. For more detailed approaches towards the use of *lex sportiva* and its boundaries see Foster, '*Lex sportiva* Transnational Law in Action' (n 268) 20-21.

[813] *Debreceni Vasutas Sport Club (DVSC) v. Nenad Novakovic*, CAS 2017/A/5111, award dated 16 January 2018 at para 134; *Club Kabuscorp do Palanca v. Rivaldo Vitor Borba Ferreira & Fédération Internationale de Football Association (FIFA)*, CAS 2015/A/4271, award dated 26 January 2017 at para 42; *Aris Limassol FC v. Carl Lombé*, CAS 2016/A/4549, award dated 4 November 2016 at para 30, etc.

[814] *World Anti-Doping Agency (WADA) v. Confederação Brasileira de Futebol (CBF) & Olivio Aparecido da Costa*, CAS 2017/A/5139, award dated 7 December 2017 at para 115; *Artur Taymazov v. International Olympic Committee (IOC)*, CAS 2017/A/5099, award dated 4 December 2017 at para 40; *Deutscher Fussball-Bund e.V. (DFB) & 1. FC Köln GmBH & Co. KGaA (FC Köln) & Nikolas Terkelsen Nartey v. Fédération Internationale de Football Association (FIFA)*, CAS 2017/A/5063, award dated 22 May 2017 at para 46; *FC Lokomotiv Moscow v. Desportivo Brasil Participações Ltda.*, CAS 2017/A/4940, award dated 14 July 2017 at para 64.

[815] *Mersin Idman Yurdu Sk v. Universal Stars Club & FIFA*, CAS 2016/A/4774, award dated 8 May 2017 at para 40; *Joseph S. Blatter v. Fédération Internationale de Football Association (FIFA)*, CAS 2016/A/4501, award dated 5 December 2016 at para 313.

[816] *KSC Lokeren v. Omer Golan & Maccabi Petach Tikva FC and Omer Golan & Maccabi Petach Tikva FC v. KSC Lokeren*, CAS 2013/A/3375 & CAS 2013/A/3376, award dated 22 August 2014 at para 88(vii)d; *Sport Luanda e Benfica FC v. Fédération Internationale de Football Association (FIFA)*, CAS 2016/A/4910, award dated 8 May 2017 at para 54, etc.

[817] *World Anti-Doping Agency (WADA) v. Comitato Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi*, CAS 2017/A/4962, award dated 3 August 2017 at para 36; *Al Jazira FSC v. FC Lokomotiv,* CAS 2016/A/4567, award dated 9 November 2016 at para 16; *World Anti-Doping Agency (WADA) v. International Weightlifting Federation (IWF) & Yenny Fernanda Alvarez Caicedo*, CAS 2016/A/4377, award dated 29 June 2016 at para 46; *Al-Gharafa S.C. v. F.C. Steaua Bucuresti & Fédération Internationale de Football Association (FIFA),* CAS 2015/A/4232, award dated 14 June 2016 at para 20; *Canadian Olympic Committee (COC) & Beckie Scott v. International Olympic Committee (IOC)*, CAS 2002/O/373, award dated 18 December 2003 at para 14, etc.

[818] Matthew Mitten, 'Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations' (2009) 9 Pepperdine Dispute Resolution Law Journal 1; Casini, 'The Making of a *Lex Sportiva*' (n 268) 27.

prospect of success.[819] Given the overall number of rendered CAS awards (over 5000 by 2016),[820] the success of challenges has been minimal.

4.4. Dispute resolution within *lex maritima*

4.4.1. The leading dispute resolution authority

It is well-known that arbitration is a preferred dispute resolution mechanism in the maritime industry and the number of shipping disputes in courts represents only a small proportion of maritime cases submitted to arbitration.[821]

Interestingly, it seems that few arbitral seats are popular for resolving maritime disputes[822] and the maritime industry actors prefer to resolve their disputes in the specialised dispute resolution institutions rather than in general arbitration centres.[823] Furthermore, approximately 90% of total worldwide maritime arbitration takes place in two specialised institutions: the London Maritime Arbitrators Association (LMAA)[824] and the Society of Maritime Arbitrators (the SMA)[825] in New York,[826] with the former handling more arbitral proceedings in the maritime industry than any major arbitration centre in general international commerce.[827]

As indicated above, the LMAA is by far the dominant provider of dispute resolution services for the industry and administers more than 1500 cases per annum.[828] According to some estimations, around 75% of all maritime arbitrations take place in London, which is attributed both to historical reasons as well as the peculiarities of functioning of the LMAA.[829] Moreover,

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[819] See the case against the CAS brought by Claudia Pechstein in the German courts: for a brief summary of the proceedings see 'Case Report: German Supreme Court upholds CAS arbitration agreement and award' (*King & Wood Mallesons*, 15 September 2016) <https://www.kwm.com/en/de/knowledge/insights/german-supreme-court-upholds-cas-arbitration-agreement-and-award-20160915> accessed 20 September 2019. Pechstein later took her case to the ECHR, but was unsuccessful there as well, see Statement of the Court of Arbitration for Sport (CAS) on the Decision Made by the European Court of Human Rights (ECHR) in the Case Between Claudia Pechstein / Adrian Mutu and Switzerland (2 October 2018) <https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf> accessed 20 September 2019.

[820] Court of Arbitration for Sport (n 722).

[821] Calliess and Klopp (n 98); Goldby and Mistelis (n 224) 2 at 1.08; Miriam Goldby, 'Enforceability of 'Spontaneous Law' in England. Some Evidence from Recent Shipping Cases' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 50 at 3.04, 59 at 3.57; Jonathan Lux, 'Dispute Resolution in the Maritime World' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 280 at 19.09.

[822] Loukas Mistelis, 'Competition of Arbitral Seats in Attracting International Maritime Arbitration Disputes' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 136 at 8.04.

[823] ibid.

[824] 'The London Maritime Arbitrators Association' (*LMAA*, [no date]) <http://lmaa.org.uk/> accessed 20 September 2019

[825] 'The Society of Maritime Arbitrators' (SMA, [no date]) <http://www.smany.org/> accessed 20 September 2019.

[826] Maurer (n 102) as cited in Dietz (n 137) 205; Goldby, 'The Performance of the Bill of Lading's Functions' (n 137) 181; see also Tassios (n 137).

[827] Calliess and Klopp (n 98) 6. In fact, for more than two centuries London has been a centre for modern international shipping and respective dispute resolution, either through arbitration or via the English courts (see Lewins (n 288)); see also Mistelis (n 822) 144-145 at 8.33.

[828] 'LMAA publishes statistics for 2018' (Practical Law Arbitration, 02 April 2019) < <https://uk.practicallaw.thomsonreuters.com/w-019-8177?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 20 September 2019.

[829] Bruce Harris, 'London Maritime Arbitration' (2011) 77 (1) Arbitration 116, 123-124; see also 'The Maritime Arbitration Universe in Numbers: One Year On' (*Holman Fenwick Willan*, May 2019) <http://www.hfw.com/downloads/001161-HFW-The-maritime-arbitration-universe-in-numbers-One-Year-On-May-19.pdf> accessed 20 September 2019.

the choice of the LMAA significantly exceeds the choice of English courts.[830] In fact, as some argue, today most of the maritime court cases in England are appeals on points of law from arbitral awards by the LMAA and other similar arbitral bodies.[831]

There are various reasons why the LMAA is so popular with commercial maritime parties. Among such reasons, Gaunt mentions flexibility of its procedures, informality in dealing with procedural applications, impartiality and experience of arbitrators, lawyers and experts, relative speed and less expense in cases decided on a document only basis, and enforcement of the awards under the New York Convention as well as support of arbitration by the judiciary.[832]

Another key aspect of the popularity of the LMAA is that the universally used standard form contracts, such as those provided by BIMCO, most frequently provide for English law and arbitration at the LMAA as the default option.[833] In addition, many standard form charterparties specify arbitration at the LMAA and English law as the governing law of such arbitration proceedings.[834]

Notably, 80% of LMAA arbitration awards are performed on a documents only basis.[835] Such a large proportion clearly meets the needs of the maritime trade community.[836]

The SMA is the second most favoured arbitration seat by maritime industry. Among the advantages offered by the SMA process is that panels are primarily comprised of experienced industry practitioners with commercial vision of maritime matters (*i.e.* 'commercial men') rather than a strictly legal one[837], the possibilities of obtaining consolidation of interrelated claims, the remedies available to the parties (most notably, the possibility of recovering attorneys' fees and the wide-ranging availability of pre-award security), and the promptness of the

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[830] Calliess and Klopp (n 98) 8. According to the authors, the same situation is present in Germany where local courts consider only a very small proportion of maritime cases compared to arbitration. This might result in the phenomenon of the fading and eventual demise of domestic maritime law.

[831] Goldby, 'Enforceability of 'Spontaneous Law' in England' (n 822) 39 at 3.36.

[832] Ian Gaunt, 'Maritime Arbitration in London: Publication of Awards, Appeals, and the Development of English Commercial Law' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 149-150 at 9.03 and 9.04. See also Tassios (n 137) 355-356. With regards to the healthy mutual relationship between LMAA and judiciary, see also Clare Ambrose, 'The Role of Standard Forms and Arbitrators' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 252 at 15.08.

[833] See clause 19 of BIMCO Recommended Uniform General Charter, wherein English law and the LMAA is specified as the first option and as a default option in the event of failure of the parties to specify applicable law and place of arbitration; Calliess and Klopp (n 98) 8-9.

[834] See, *e.g.*, clause 17 of NYPE 1946, clause 45 of NYPE 1993, clause 19 of Gencon 1994, clause 46 of Shelltime 4. See also Yvonne Baatz, 'Incorporation of a Charterparty Arbitration Clause into a Bill of Lading and Its Effect on Third Parties' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 107 at 7.01.

[835] Expensive oral hearings being the main reason for this fact, see Gaunt (n 832) 153 at 9.11.

[836] However, it seems that the judiciary is not willing to accept this practice: on several occasions English judges have criticised documentary-based arbitration and emphasised the need to hold oral hearings, see for example, Cooke J in *Maestro Bulk Shipping v Cosco Bulk Carrier Co, Ltd [2014] EWHC 3978 (Comm)*, Eder J in *HBC Hamburg Bulk Carriers GmbH & Co KG v Huyton (The Glory Sanye)* [2014] EWHC 4176, Colman J in *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep 109.

[837] Which were defined by the United States' courts as individuals who have substantial, practical, commercial experience and who work or have worked for commercial entities, see *W.K. Webster & Co. v. American President Lines Ltd.*, 32 F.3d 665 (2d Cir. 1994) and *US Ship Management, Inc. v. Maersk Line*, Ltd., 188 F. Supp. 2d 358 (S.D.N.Y. 2002); see also 'Guide To Maritime Arbitration In New York' (*SMA*, [no date]) <http://www.smany.org/new-york-maritime-arbitration-guide.html> accessed 20 September 2019.

procedure.[838] As was stated by the sole arbitrator in *SMA Award No. 4214,*[839] the arbitration at the SMA is "a process which is based upon the facts, the applicable contract law, legal and arbitral precedent cognizant of commercial realities and customs, a process which, on certain issues, is less formal than the courts and places emphasis on equity and fairness within the framework of the law". Of course, this statement can be applied to the LMAA as well.

The LMAA and the SMA have a number of distinct features in comparison with other maritime arbitration centres. For example, both the LMAA and the SMA have closed memberships. Both of these centres are not institutionalised and therefore do not function as an administering body or appointing authority, thereby not exercising any control over arbitrations.[840] Administration is undertaken by individual arbitral tribunals, and within the LMAA they are free to decide the the Terms issued by the LMAA be not applied.[841] Therefore, technically, all LMAA and SMA arbitrations should be considered as *ad hoc.*[842] In addition, within the LMAA process there are no fixed timetables for hearings and any procedural matters tend to be decided on a stage-by-stage basis.[843]

4.4.2. Publication of rendered decisions

Notably, both the LMAA and the SMA publish arbitral awards, albeit under different procedures, which results in arbitrators being unlikely to ignore previous awards on the same issue when making an award themselves.[844] The need to publish maritime arbitral awards has long been discussed by academics and practitioners.[845] It is argued that publishing arbitral awards is an essential condition to the creation of precedent and a high degree of consistency, which should eventually result in a court citing an arbitral award.[846]

Publication of awards is performed differently by the LMAA and the SMA. In the LMAA, awards are published only upon recommendation by the arbitrator (if such awards carry general public interest)[847] and with the agreement of both parties.[848] Unfortunately, there is no guidance

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[838] André Pereira da Fonseca, 'Chapter 34: SMA Arbitration' in Laurence Shore and others (eds), *International Arbitration in the United States* (Kluwer Law International 2017)
797; Tassios (n 137) 360.

[839] Dated 30 July 2013.

[840] Harris, 'London Maritime Arbitration' (n 830) 121; Harris, 'Maritime Arbitration in London' (n 290) 21. This is considered as one of the key attractions of the LMAA service, see also Joanna Steele, 'The LMAA in the Twenty-First Century: Securing the Future for London Maritime Arbitration' (2010) 76 (3) Arbitration 405, 407; Clare Ambrose, Karen Maxwell and Michael Collett, *London Maritime Arbitration* (4th edn, Routledge 2018) 3.

[841] Harris, 'London Maritime Arbitration' (n 830) 122; Hans Sperling, 'New London Arbitration Rules: Paradise Regained' (1997) 21 Tulane Maritime Law Journal 557, 583.

[842] Mistelis (n 822) 145 at 8.33; 'Guide To Maritime Arbitration In New York' (n 837).

[843] Harris, 'Maritime Arbitration in London' (n 290) 24.

[844] Goldby, 'The Performance of the Bill of Lading's Functions' (n 137) 181.

[845] Donald Davies, 'A view of London Maritime Arbitration' (1986) 52 (3) Arbitration 150, 162; Tassios (n 137); Cindy Buys, 'The Tension between Confidentiality and Transparency in International Arbitration' (2003) 14 American Review of International Arbitration 121; Alexis Brown, 'Presumption meets Reality: an Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 American University International Law Review 969; Ambrose (n 832) 252 at 15.11; Calliess and Klopp (n 98) 9.

[846] Calliess and Klopp (n 98) 10; Bernard Rix, 'The Contribution of Arbitration to the Law' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 18.08-18.10.

[847] Ambrose, Maxwell and Collett (n 840) 225.

[848] See article 28 of the LMAA Terms 2017.

included in the LMAA Terms as to which matters or aspects can be considered as being worthy of publication,[849] therefore the tribunal's decision to publish an award is purely discretionary. Furthermore, the absence of either party's consent effectively blocks publication of an award.

In reality, it seems that the parties often refrain from giving their consent to publication of the arbitration outcome despite the fact that the identity and names of the parties are not disclosed in a published award.[850] According to my research, from November 1979 to March 2018 there were only 740 LMAA awards published. In contrast, in 2016 and 2017, more than one thousand awards were rendered.[851] LMAA statistical data from 1996 to 2017 reveals that 12,030 awards were rendered, but my research showed only 405 published results of the LMAA arbitral proceedings in the same period, thus comprising the marginal rate of publication at only 3.37%.

A further drawback of the LMAA publication procedure is that publication of arbitral proceedings results is done exclusively through a subscription database, namely the Lloyd's Maritime Law Newsletter (the LMLN).[852] The annual subscription for access to such database is £2000, which, of course, is a substantial amount that may not be considered a worthwhile investment by small enterprises, private entrepreneurs, academics, other professionals etc., who have an interest in maritime law matters. Thus, such approach significantly restricts dissemination of LMAA jurisprudence.

Furthermore, upon access to LMAA arbitral awards included in the LMLN one would be disappointed with the adequacy of the published information. Despite the LMLN claiming that it is publishing awards, in reality the information provided is simply a summary and does not therefore provide a full picture of the issues considered. Moreover, the editor of the LMLN admits that such summaries may not mention every single fact of the LMAA award, but only what are considered to be relevant facts.[853] In addition, all draft summaries are reviewed and, if necessary, amended and corrected by the relevant LMAA tribunal before being published.[854] This results in uncertainty as to the completeness of the information provided. Upon my analysis of all 740 available published LMAA awards in the LMLN from November 1979 to March 2018 I found that such arbitration summaries significantly varied in their length: from as little as 50 words[855] to as extensive as 5000 words.[856] Inevitably, this gives cause for concern as to the general value of these published arbitration summaries (although Gaunt, for instance,

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[849] The LMAA website refers to such awards as "more generally interesting", see 'Frequently Asked Questions' (*LMAA*, [no date]) <http://www.lmaa.london/faq.aspx?pkFaqCatID=cb4a0ebd-0740-4666-8112-18279dd3cf35 > accessed 20 November 2018.

[850] See article 28 of the LMAA Terms 2017.

[851] 'LMAA 2017 statistics' (*LMAA*, [no date]) <http://www.lmaa.london/news-article.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce > accessed 20 November 2018.

[852] 'Lloyd's Maritime Law Newsletter' (*LMLN*, [no date]) <https://www.lmln.com/> accessed 20 September 2019.

[853] Michael Daiches, 'Welcome to Lloyd's Maritime Law Newsletter, 1,000th issue' (2018) 1000 Lloyd's Maritime Law Newsletter.

[854] ibid.

[855] See *London Arbitration 22/87* (1987) 209 LMLN 4(2) dated 7 November 1987.

[856] *London Arbitration 15/05* (2005) 670 LMLN 1 dated 20 July 2005; *London Arbitration 22/10* (2010) 809 LMLN 1 dated 26 November 2010; *London Arbitration 7/11* (2011) 828 LMLN 1 dated 19 August 2011.

gives several examples of practices, such as the use of piracy clauses, deliberate back-dating of a contract and future earnings lost discounted rate in cases of repudiation of a time charter, which were changed following publication of the respective LMAA arbitral summaries in these matters).[857]

In contrast, the SMA has a different approach towards publication of rendered awards: not only is there no anonymity basis, but also by default the SMA publishes all rendered awards, unless both parties request otherwise.[858] This has resulted in a considerable number of published arbitral awards: according to the SMA, there have been over 4,200 such awards published since the SMA was established.[859] Such awards published in their own subscription database, namely the SMA Award Service, which is available at considerably lower cost ($595.00 per annum) than the LMAA equivalent database.[860] More usefully, SMA awards are also published in the LexisNexis and Westlaw databases,[861] albeit with some limitations with regards to the latter.[862] This contributes significantly to the wider dissemination of SMA awards among the legal and professional community, because these two databases are most widely used by both academics and practitioners.[863]

There have been some attempts in academic literature to analyse the role of the SMA in the development of maritime law, in particular through the prism of awards publication and their content. Using LexisNexis database, Calliess and Klopp performed an analysis of the practice of the SMA.[864] They reached the conclusion that, despite being capable of playing an influential role in the development of maritime law through building precedential arbitral law, in reality SMA awards are of little significance.[865] The authors provide several reasons for such findings.

Firstly, they point out that in spite of the policy of promulgation of SMA awards, they were able to find only 14 published awards in 2014. They further stated that in the past 10 years the situation was the same with only 12 to 18 awards being available each year. This is a quite low number, Calliess and Klopp continue, for a system which produces around 100 awards per annum.

As with the CAS practice analysis, I decided to undertake my own analysis of the awards published by the SMA. As a result of this, I came to the conclusion that there were some flaws in Calliess and Klopp's research methodology which led to misleading outcomes and

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[857] Gaunt (n 832) 152 at 9.09.
[858] See Section 1 of the SMA Maritime Arbitration Rules.
[859] 'SMA Award Service' (*SMA*, [no date] <http://www.smany.org/award-service-main.html> accessed 20 September 2019; 'The Arbitrator' (*SMA*, [no date] <http://www.smany.org/publications-the-arbitrator.html> accessed 20 September 2019.
[860] 'SMA Award Service' (n 859).
[861] 'The Arbitrator' (n 859).
[862] Perhaps this depends on the terms and conditions of the licensing agreement (I was using the subscription account of my academic institution), but at Westlaw it was only possible to retrieve the ten latest awards.
[863] See Jim Haggerty, 'LexisNexis versus Westlaw revisited: Comparison of top legal research platforms' (*LAC Group*, 22 February 2018) <https://lac-group.com/lexisnexis-versus-westlaw-revisited/> accessed 20 September 2019.
[864] See Calliess and Klopp (n 98) 10-11.
[865] ibid 11.

conclusions.

To begin with, I examined the figure of 100 rendered awards per annum. In their analysis Calliess and Klopp used this figure, relying on the 2004 article by Tassios.[866] However, in his article Tassios explicitly mentions that this is his own estimation based on the information from the SMA web link (that I found to be currently unavailable) showing that by 1997 there had been 3,400 awards rendered.[867] Hence, Tassios must have based his calculations of the average number of the rendered awards on the proposition that the SMA had established in 1963, meaning that on average the SMA would have rendered approximately 100 awards per year since its inception. Tassios used this proposition to conclude that by 2004, the time of publication of his article, the SMA has issued approximately 4,000 awards.[868]

However, such proposition does not seem to be justified, because at the time of my writing this thesis 15 years later, the SMA website specifies the number of rendered awards as being around 4,200,[869] *i.e.* modestly higher than Tassios claimed in 2004. What is more important, however, is that every SMA award, whether published or not, is sequentially numbered. In fact, SMA award No. 4000 was rendered on 28 May 2008, *i.e.* four years after Tassios authored article appeared.

Furthermore, due to such sequential numbering it is possible to calculate how many awards were rendered in 2014 (or any other year), the data from which Calliess and Klopp used for their analysis. Thus, according to the LexisNexis database, SMA award No. 4225 was rendered in 2014, whilst SMA award No. 4224 in 2013. Therefore, the former award should be our starting point for 2014.[870] Similarly, the last award rendered in 2014 is No. 4243, because the SMA award No. 4244 dates from 2015.

Upon analysis of SMA awards from No. 4225 to No. 4243 it appears that two awards (No. 4233 and No. 4234) were rendered in 2013. Therefore, this results in only 17 SMA awards having been rendered in 2014, not the 100 claimed by Calliess and Klopp.[871] Furthermore, each of the 17 SMA awards rendered in 2014 was published and is still available via the LexisNexis database, resulting in a 100% publication rate.

In the course of my research I decided to proceed with the calculation of awards rendered by the SMA. In order to have a more comprehensive picture as well as to test and compare my

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[866] Tassios (n 137) specifically referring to footnote 29 of the article.
[867] ibid.
[868] Tassios (n 137) 359.
[869] 'SMA Award Service' (n 859); 'The Arbitrator' (n 859).
[870] Although for the sake of avoidance of any mistakes on my part, all awards rendered in 2013-2017 were studied in order to mitigate the risk of occasional incorrect numbering by the SMA.
[871] Tassios, being the reference source for Calliess and Klopp, refers to the website of the SMA, but the link provided in his article is not available. He mentions that by 2004 there were around 4000 awards rendered by the SMA. Hence, he based his calculations of the average number of rendered awards on the proposition that the SMA was established in 1963, meaning that on average the SMA would have rendered approximately 100 awards per year since its inception. However, this cannot be the case, because SMA award No. 4000 was rendered only on 28 May 2008, *i.e.* four years after Tassios' article was written.

findings with the findings of findings of Calliess and Klopp in 2014, I analysed SMA awards rendered from 2013 to 2018. Upon my analysis it appears that while the number of rendered awards in any of the analysed years is more significant than in 2014, there has not been any year when the number was anything close to 100 awards (see Table 2).

Table 2. Published SMA awards in 2013-2018

Year	Published SMA awards	Notes
2013	29	Awards from No. 4198 to No. 4224, plus awards No. 4233 and No. 4234
2014	17	Awards from No. 4225 to No. 4243, except for No. 4233 and No. 4234 which were rendered in 2013
2015	24	Awards from No. 4244 to No. 4266, plus award No. 4274
2016	29	Awards from No. 4267 to No. 4295, plus award No. 4321, but except for award No. 4274 which was rendered in 2015
2017	38	Awards from No. 4296 to No. 4334, except for award No. 4321 which was rendered in 2016
2018	22	Awards from No. 4335 to No. 4358, except for awards No. 4356 and No. 4357 which were rendered in 2019

However, the most surprising detail is that *all* of the aforementioned 159 awards rendered in the last six years were published and are accessible via the LexisNexis database. The SMA, unlike any other arbitral institution, is indeed achieving a remarkable figure of 100% publishing. Therefore, the critique of Calliess and Klopp in relation to the small amount of published SMA awards is not sustainable, and thus their proposition that the low publication rate of SMA arbitral awards is indicative of the parties' preference of confidentiality in arbitration[872] is incorrect. As proved herein, the SMA, while adopting a unique model of detailed publication which includes parties' names and other commercially relevant details, such as contract price, number of units shipped, etc., is widely accepted by maritime parties.

As their second criticism, Calliess and Klopp express concerns about the poor quality of legal reasoning in the awards they analysed: they claim that out of 14 SMA awards in 2014 only two cited any legal norms, only four cited court rulings and only two cited previous SMA awards. However, as I will show further, this argument seems to be somewhat exaggerated.

It is true that on the surface it may look that there is a lack of reference to a variety of legal

[872] Calliess and Klopp (n 98) 11.

sources in some of the SMA awards, which is partly explained by the fact that very few SMA arbitrators are drawn from those from a legal background,[873] thereby earning the service a reputation of being commercially astute.[874] However, upon my analysis of substantive issues in each of the cases, it seems that in many matters there was simply no need to refer to sophisticated legal sources. To illustrate this, my analysis of SMA awards rendered in 2014 was made (as Calliess and Klopp did). It appears that in 8 out of 17 awards rendered that year no reference was made to any sort of legal source. However, 3 of those 8 awards were partial, *i.e.* dealt only with one particular issue in the case. Furthermore, in several cases there was no necessity for an SMA panel to analyse any external legal source in addition to the contract and factual circumstances, because such cases dealt with the non-payment by the plaintiff of the arbitration fee,[875] correct calculation of expenses for reimbursement as per the formula provided in the relevant contract,[876] correct calculation of outstanding payments owed as per invoices and application of interest,[877] etc.[878] Therefore, a purely quantitative analysis of the awards performed by Calliess and Klopp without proper contextualisation is not indicative of the actual situation. Furthermore, for some reason the authors also failed to acknowledge that in the same period there were arbitral awards which cited a considerable variety of sources, ranging from international conventions[879] and local laws and court judgments[880] (not only United States courts,[881] but also English)[882] to previous SMA awards[883] and academic books and articles.[884]

A deeper analysis of SMA awards from different periods seems to reveal an even more comprehensive picture. The above described variety of cited legal sources in SMA awards is the norm rather than an exception. Through my conducted analysis I identified that, since the organisation's establishment, the arbitrators (as well as the parties when presenting their arguments) frequently referred to various legal sources when deciding a dispute, such as court judgments (most often from the United States, but also a significant number from England, and occasionally Canada,), legal acts (most often the United States Carriage of Goods by Sea Act

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[873] Martin Davies, 'The US Perspective on Charterparty Disputes' (2017) 23 (6) Journal of International Maritime Law 468, 471. In fact, the member roster section provides that of the 72 members only 20 have law degrees, see 'Member Roster'(*SMA*, [no date] < http://smany.org/member-roster.html> accessed 20 November 2018.

[874] Tassios (n 137) 360.

[875] *SMA award No. 4225* dated 4 February 2014.

[876] *SMA Award No. 4229* dated 24 February 2014 and *SMA Award No. 4240* dated 10 September 2014.

[877] *SMA award No. 4243* dated 19 December 2014.

[878] Of course, this raises other concerns with regards to the importance of publication of such awards, which allegedly should carry precedential value.

[879] See *SMA Award No. 4227* dated 18 February 2014, *SMA Award No. 4228* dated 18 March 2014 and *SMA Award No. 4238* dated 28 July 2014.

[880] *SMA Award No. 4232* dated 25 February 2014, *SMA Award No. 4236* dated 23 July 2014 and *SMA Award No. 4241* dated 12 September 2014

[881] *SMA Award No. 4228* dated 18 March 2014, *SMA Award No. 4231* dated 3 April 2014, *SMA Award No. 4236* dated 23 July 2014, *SMA Award No. 4238* dated 28 July 2014 and *SMA Award No. 4239* dated 28 August 2014.

[882] *SMA Award No. 4239* dated 28 August 2014.

[883] *SMA Award No. 4230* dated 31 March 2014, *SMA Award No. 4238* dated 28 July 2014 and *SMA Award No. 4239* dated 28 August 2014.

[884] *SMA Award No. 4228* dated 18 March 2014 and *SMA Award No. 4239* dated 28 August 2014.

1936 and the United States Uniform Commercial Code, but also the Hague Rules 1924, New York Civil Practice Law and Rules 1962, Racketeer Influenced and Corrupt Organizations Act 1970, et. al.), academic sources (various books on maritime law, damages and torts, most often various editions of Scrutton on Charter Parties, Voyage Charters, Corbin on Contracts, Time Charters, Prosser on Torts et. al., and articles),[885] as well as maritime trade usages and customs.[886] However, the most important development by the SMA is its case law.

4.4.3. Use of precedent in dispute resolution

The SMA specifically states that whilst its arbitrators are not absolutely bound by arbitral precedents, "in an effort to maintain consistency, panels do take prior awards into consideration".[887] The popularity of taking account of previous SMA arbitral awards has clearly been influenced by the SMA's policy of fully inclusive publication of such awards and resulted in the development of a unique legal system, in this case in the area of maritime law.

My research of published SMA awards via the LexisNexis database reveals that there have been more than 450 instances where the tribunal and/or one or both parties cited previous SMA award(s) to support its arguments.[888] However, it is highly likely that there are more SMA awards wherein the parties or a tribunal cited previous awards, because a) some SMA awards might not have been published in the years not closely analysed by me; b) some of the published SMA awards do not mention the requisites of previous awards, but clearly state that one of the parties cited some previous awards or that a tribunal took into consideration previous SMA awards;[889] and c) the process of identification of such awards is excessively time-consuming: not only is there no proper search function embedded into the LexisNexis search engine to simplify the process which results in the only meaningful option of search by keyword, but also SMA tribunals have been inconsistent in their nomenclature when citing previous awards using such terms as "SMA Award", "S.M.A. Award", "SMA #", "S.M.A. No.", "Award" and other variations, making the keyword search even more complicated.[890]

Nevertheless, even the figure of 450 awards referred to above (*i.e.*, approximately one in ten awards) is indicative of the importance of SMA case law, given that, as has been shown herein, in many matters decided by the SMA there is simply no need to refer to any previously rendered awards. At the same time, in some SMA awards reference to previous awards is made quite extensively. For example, in *SMA Award No. 4274*[891] reference was made to 19

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[885] For more details, see Appendix VI. Reference to previously rendered awards by the SMA.
[886] See, for example, *SMA Award No. 746* dated 8 December 1972, *SMA Award No. 772* [undated], *SMA Award No. 1049* dated 17 August 1976, *SMA Award No. 1345* dated 23 July 1979, *SMA Award No. 1689* dated 21 June 1982, *SMA Award No. 1766* dated 29 December 1982 and *SMA Award No. 2694* dated 15 May 1990. See also Fonseca (n 838) 787.
[887] 'The Arbitrator' (n 859).
[888] See Appendix VI. Reference to previously rendered awards by the SMA.
[889] See, for example, *SMA Award No. 3899* dated 28 October 2005, *SMA Award No. 3171* dated 1 May 1995, *SMA Award No. 2864* dated 27 April 1992, *SMA Award No. 2032* dated 31 October 1984, etc.
[890] Perhaps, if done through the SMA Award Service the search is easier, but unfortunately I did not have any access to this.
[891] Dated 22 September 2015.

previously rendered SMA awards, in *SMA Award No. 4102*[892] to 20 awards, in *SMA Award No. 4221*[893] to 22 awards, and 24 previous SMA awards were cited in *SMA Award No. 4249.*[894] Notably, there has been no shift towards who refers to SMA case law more often: parties to arbitral proceedings cited previous cases in support of their position on 194 occasions, whereas the relevant tribunal made such references in 192 cases (with another 70 instances wherein references to previous SMA awards were made by both the tribunal and the parties).[895]

Moreover, within the SMA arbitration process not only previous SMA awards are cited, but also awards made by other arbitral bodies, most notably by the LMAA.[896] This fact, along with the widespread practice of relying on court cases from several jurisdictions, international conventions, academic sources, trade usages and customs, etc., as well as the consistent and detailed publication of rendered awards makes the SMA arbitration a truly unique and effective example of transparency in arbitration which provides certainty, consistency and uniformity to the maritime community.[897]

Unfortunately, that cannot be said of the LMAA. A proper external analysis of rendered LMAA awards is not possible because of its highly restrictive awards publishing, but also, more importantly, because of the inadequate quality of such publishing, *i.e.* summary of an award rather than full details of an award. Thus, any assessment of the usefulness of an analysis performed needs to be mindful of these limitations.

Callies and Klopp analysed the practice of the LMAA based on summaries published in the LMLN database.[898] According to their estimation, there were 17 award summaries published in 2014. Their conclusion was that the LMAA cites more court cases (on 10 occasions) than the SMA, but reliance on previously rendered awards and other legal norms is low (only two instances of each). Therefore, the authors concluded that LMAA awards also do not carry any precedential value.[899]

Interestingly, while undertaking my own research, I found one award less for 2014,[900] hence my slightly different result with regards to the number of awards mentioning court cases and legal norms (nine and one respectively). At the same time, in only two out of 16 cases was a previously rendered LMAA award cited,[901] which corresponds to the findings of Callies and

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[892] Dated 1 December 2010.
[893] Dated 12 November 2013.
[894] Dated 23 January 2015.
[895] For more details, see Appendix VI. Reference to previously rendered awards by the SMA.
[896] See, for example, *SMA Award No. 3846* dated 31 May 2004, *SMA Award No. 3443* dated 28 April 1998, *SMA Award No. 3311* dated 11 October 1996, *SMA Award No. 2868* dated 31 March 1992, *SMA Award No. 2737* dated 20 December 1990 and *SMA Award No. 2618* dated 22 December 1989 (here the award from Chambre Arbitrale Maritime De Paris was also mentioned).
[897] Fonseca (n 838) 797; Tassios (n 137) 360.
[898] Calliess and Klopp (n 98) 11-12.
[899] ibid.
[900] Which raises a question as to whether previously published summaries can be deleted from the database at a later stage.
[901] See *London Arbitration 4/14* (2014) 892 LMLN 3 dated 11 February 2014 and *London Arbitration 7/14 (*2014) 895 LMLN 4 dated 20 March 2014.

Klopp.

Furthermore, in subsequent years the general picture has not changed much. Based on my analysis of LMAA summaries for the period from 2013 to the first quarter of 2018, the statistics are as follows:

Table 3. LMAA awards summaries in 2013-2018 (January-March) and sources cited therein

Year	Number of summaries published	Summaries citing LMAA awards	Summaries citing court cases	Summaries citing other legal norms	Summaries citing academic sources
2013	7	1	7	2	1
2014	16 (17)*	2	9 (10)*	1 (2)*	1
2015	16	1	8	2	6
2016	24	2	11	3	2
2017	27	1	14	1	2
2018 (Jan-Mar)	10	1	3	1	0

* According to the data used by Callies and Klopp (2014)

The data above is quite consistent and shows that previous LMAA awards are rarely relied upon by the parties or arbitral tribunals under the LMAA. No references to SMA awards were made in the analysed period, but I was able to identify a number of previous LMAA summaries wherein the parties presented an SMA award as one of their arguments.[902]

A citation of at least one English court case was made in roughly one half of the published summaries in the analysed period[903] (although in 2013 at least one court case was mentioned in each of the published LMAA summaries). At the same time, it is worth noting that in many such instances more than one judgment was referenced, and in three cases the number of the cited court decisions was as high as eleven.[904] Legal norms are rarely referred to and such instances are mostly limited to English legal acts only (such as Companies Act 2006, Carriage of Goods by Sea Act 1992, Limitation Act 1980).[905]

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[902] See mentioning of *SMA Award No. 3009* dated 20 September 1993 in *London Arbitration 5/97* (1997) 458 LMLN 3 dated 24 May 1997, *SMA Award No. 1279* dated 7 December 1978 in *London Arbitration 9/01* (2001) 560 LMLN 4 dated 26 April 2001, and *SMA Award No. 522* [undated] in *London Arbitration 10/03* (2003) 619 LMLN 3 dated 7 August 2003. There were also cases when no mentioning of any SMA award was made, but the arbitrators referred to the position of "American awards", see *London Arbitration 12/84* (1984) 125 LMLN 2 dated 16 August 1984.

[903] Only in *London Arbitration 15/15 (*2015) 934 LMLN 3 dated 17 September 2015 a US Court judgment was relied upon.

[904] See, for example, *London Arbitration 1/16* (2016) 942 LMLN 2 dated 11 January 2016, *London Arbitration 9/15* (2015) 927 LMLN 4 dated 9 June 2015 and London Arbitration 15/15 (2015) 934 LMLN 3 dated 17 September 2015.

[905] Although occasionally references were made to Hague and Hague-Visby Rules and Rome I EC Regulation. Notably, on one occasion only did the tribunal consider foreign acts: in *London Arbitration 3/16* (2016) 945 LMLN 2 dated 11 February 2016 several norms from Chinese legal acts were cited.

The notable trend is that the number of published LMAA summaries has been gradually increasing (in 2018 a projection of up to 40 LMAA summaries could be made based on the data from the first quarter). However, this is still a small proportion of LMAA awards rendered per year. The small number of published LMAA awards and, more importantly, the form in which such awards are published significantly precludes the development of maritime law through specialised arbitration, which is in part confirmed by the fact of little reliance on previously rendered LMAA awards.

4.4.4. Reliance on existing and development of new industry-specific principles, customs, usages and practices through dispute resolution

Neither the SMA, nor the LMAA explicitly refer to the term '*lex maritima*' in their awards. However, the SMA often uses the term 'general maritime law' or 'general maritime law of the United States', sometimes limiting this concept to certain regulatory areas (general maritime law of salvage)[906] or local practice (general maritime law as applied in New York).[907] The Maritime Law Answer Book 2016 provides that general maritime law includes consistent principles of maritime law which reflect international practice of the maritime industry and of maritime commerce, and that decisions based on general maritime law are widely recognised around the world.[908] In this definition decisions are meant to be court decisions,[909] specifically US courts' decisions if one talks about general maritime law of the United States (which, as was noted as long as nearly a century ago, adhere to and apply the principles of common international acceptance in maritime matters).[910] Thus, this has resulted that, in the US, general maritime law consists of court decisions incorporating judicial principles in resolving maritime disputes,[911] whereas state law, apart from certain exceptions,[912] is not considered as a part of general maritime law and can only supplement it where there are any gaps in regulation.[913] In fact, the US Supreme Court in *Southern Pacific Company v Jensen*[914] stipulated that "state law is inapplicable to a maritime cause of action if it works material prejudice to the characteristic features of the general maritime law or interferes with the proper

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[906] See, for example, *SMA Award No. 3858* dated 30 August 2004; *SMA Award No. 3205* dated 31 August 1995; *SMA Award No. 3777* dated 25 March 2003, etc.

[907] See, for example, *SMA Award No. 3760* dated 28 October 2002 and *SMA Award No. 3256* dated 27 March 1996, etc.

[908] Charlie Papavizas and Allen Black, *Maritime Law Answer Book 2016* (Practising Law Institute 2016) 3.

[909] Although SMA arbitrators also refer to previously rendered SMA awards dealing with general maritime law as a credible authority (see *SMA Award No. 4296* dated 5 January 2017).

[910] Wright (n 226) 130-131. See also modern commentaries, such as Mark Yost, 'International Maritime Law & the U.S. Admiralty Lawyer: A Current Assessment' (1995) 7 University of San Francisco Maritime Law Journal 313.

[911] Otis Felder, 'Get on Board' (2006) 15 (4) Business Law Today.

[912] See *SMA Award No. 4331* dated 8 November 2017 which relied on *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986) and *Southwork Machinery Co., Inc. v. F/V COREY PRIDE*, 994 F.2d 37, 40 n. 3 (1st Cir. 1993) and specified that the Uniform Commercial Code is a part of general maritime law. See also *SMA Award No. 4308* dated 17 March 2017. Although earlier the position was different and there were no exceptions with regards to the rule of the non-application of any kind of state-made law, see *SMA Award No. 2534-A* dated 12 September 1986 citing the US Supreme Court Judgement in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

[913] Felder (n 911); Michael Orlando, 'Admiralty Jurisdiction: A Challenge for Even the Seasoned Practitioner' (*IRMI Update*, May 2001) < https://www.irmi.com/articles/expert-commentary/admiralty-jurisdiction-a-challenge-for-even-the-seasoned-practitioner > accessed 20 September 2019.

[914] 244 U.S. 205, 37 S.Ct. 524 (1917).

harmony and uniformity of that law in its international and interstate relations". Thus, state legislation or state court decisions should not substantially alter the characteristic features of the general maritime law. As noted by some commentators, this doctrine of uniformity has since become firmly entrenched in the USA's judicial practice and the courts' main task has been to determine whether state legislation has interfered with the required uniformity.[915] Notably, the same task is often faced by SMA arbitrators.[916] In essence, the concept of general maritime law takes historical roots from the medieval *lex maritima*[917] and perhaps is a desired compromise taken during the nationalisation of commercial regulation in the 18th and 19th centuries.

Nevertheless, whilst not directly referring to *lex maritima*, both arbitration centres often deal with maritime customs and practices in the decision-making process, and regularly reach similar conclusions independently of each other. Notably, the treatment of customs and usages in the arbitral practice of the SMA and the LMAA is almost identical. In fact, sometimes these institutions adopt exactly the same arguments. In *SMA Award No. 1345*[918] the arbitral tribunal agreed with the reasoning of one of the parties that customs should be reasonable, certain and notorious. Nearly 15 years later an LMAA tribunal[919] used identical reasoning when stating that in order to prove a custom in the arbitral hearing a party should adduce expert evidence by collecting statements from a large number of people in the relevant industry as to the alleged custom, which should be notorious, certain and reasonable. Of course, the tribunal continued, this is an onerous duty for a party, especially nowadays which have seen a significant extension and diversification of commercial activities. Furthermore, the arbitrator in *London Arbitration 12/84*[920] highlighted another difficulty associated with customs, namely their unfortunate tendency of becoming obsolete due to changing commercial practices and/or technical advancement. In this case the arbitrator openly stated that his/her decision would have been completely opposite ten or five years ago, but since then the custom had changed considerably.

As mentioned by the arbitral tribunal in *London Arbitration 15/97*,[921] a custom has to be universally acquiesced in and this requires proof and evidence from a party. The SMA usually adheres to the same position placing the burden of proof of the alleged custom on the party

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[915] 'Applicability of the General Maritime Law in the Local Navigable Waters of Puerto Rico' (1961) 35 (2) St. John's Law Review 324.

[916] See *SMA Award No. 3890* dated 15 July 2005; *SMA Award No. 3387* dated 15 September 1997; *SMA Award No. 3127* dated 18 November 1994; *SMA Award No. 2978* dated 25 June 1993; *SMA Award No. 2975* dated 30 April 1993; *SMA Award No. 2681* dated 22 June 1990. Although see also *SMA Award No. 2663* dated 13 February 1990, which states that the Carriage of Goods by Sea Act codified general maritime law.

[917] Wright (n 226) 130-131.

[918] Dated 23 July 1979.

[919] *London Arbitration 3/95 (*1995) 401 LMLN 4 dated 18 March 1995.

[920] *(*1984) 125 LMLN 2 dated 16 August 1984.

[921] *(*1997) 465 LMLN 4 dated 30 August 1997.

relying on it.[922] Illustratively, when the party in *SMA Award No. 3963*[923] tried to convince the panel that usage of the ASDEM formula to assess any under-performance by a tanker's pumps during discharge of the cargo was common practice in shipping nowadays, the tribunal noticed: "among the benefits of commercial arbitration is the existence of commercial, sometimes technical and sometimes legal experience in the panel members. The existence of such experience does not, however, relieve the parties of the burden to provide sufficient expert testimony and other such evidence to support their contentions".[924]

Notably, the only major difference in the treatment of customs and usages between the LMAA and the SMA is that the latter often looks at the issue through the prism of the US Uniform Commercial Code §1-205 (2)-(6) 'Course of Dealing and Usage of Trade'[925] and the Restatement (Second) of the Law of Contracts 1981 §202 (5) 'Rules in Aid of Interpretation'.[926] Thus, often when a party asserts that there is a certain custom or usage, SMA arbitrators refer to the abovementioned legal instruments in order to meet the requirements specified therein.[927]

Throughout my research I identified that both owners and charterers rely, at least partially, on specific trade customs, usages and practices in presentation of their arguments. However, very often LMAA tribunals disregard any such arguments, if it is not supported by sufficient

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[922] See, for example, *SMA Award No. 683* dated 7 February 1972; *SMA Award No. 398* dated 4 June 1969; *SMA Award No. 2661* dated 4 April 1990; *SMA Award No. 1890* dated 6 October 1983; *SMA Award No. 2262* [undated].

[923] Dated 1 June 2007.

[924] ibid.

[925] The relevant provision provides that:
(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.
(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

[926] Which stipulates that wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

[927] See, for example, *SMA Award No. 3864* dated 1 October 2004, wherein the arbitral tribunal resolved that two affidavits submitted in support of the existence of a custom/practice to sample inbound cargoes at Southwest Pass were not sufficient to satisfy the "usage of trade" standard set forth in UCC § 1-205 (2). See also *SMA Award No. 2953* dated 26 February 1993; *SMA Award No. 2186 (Refer No. 1347)* dated 7 January 1986. Notably, the SMA Award Service includes a judgment by the U.S. District Court for the Eastern District of Pennsylvania in *Sun Oil Co. of Pennsylvania v. M/T Mercedes Maria,* 1983 A.M.C. 718 (E.D.Pa. 1982) and the U.S. Court of Appeals for the Third Circuit in *Sun Oil Company of Pennsylvania, Sun International, Ltd., Appellants, v. M/t Carisle, Her Engines, Boilers, Tackle, Etc., in Rem, Oresea Transport S.a. of Panama, and Tradax Gestion, S.a,* 771 F.2d 805 (3d Cir. 1985) in which the existence of 0.5% customary trade allowance in the bulk oil shipping industry was confirmed on the basis of expert witnesses, including from both of the parties to the case.

evidence from a party that such usage, custom or practice exists.[928] In addition, both the LMAA and the SMA frequently favour express contractual terms or legal norms over any alleged customs. For example, in *London Arbitration 14/01*[929] the question before the tribunal was whether it was an express or implied duty of charterers to fumigate the cargo of rice. The owners (claimants) argued that there was such implied obligation in relation to fumigating such cargo on the basis of established usage and "both parties knew of that and would, if asked, have unhesitatingly agreed that it should be part of the bargain; or that it should be implied because the contract would not work otherwise." However, the tribunal, whilst agreeing that the experts had never heard of Thai rice cargo not being fumigated, stated that it was not provided with sufficient evidence to justify a finding that it was an invariable practice. Consequently, it concentrated on interpretation of the contract between the owners and the charterers and decided in favour of the latter. Similarly, in *SMA Award No. 1636*[930] the arbitrators acknowledged the existence of a customary trade allowance of 0.5%. At the same time, they refused to follow it because it was inconsistent with the express terms of the contract.[931]

The general rule of the prevalence of express terms of a contract over any customs or usages was highlighted in an extensive dissent opinion by Francis Elias in *SMA Award No. 2910*.[932] There he examined several aspects untouched by his colleagues, one of them being the fact that the contract between the parties expressly provided for the application of customary industry practice. His conclusion was that an industry practice may only be used to supplement or qualify a vague or ambiguous term in the agreement.[933] Similarly, in *SMA Award No. 4338*[934] it was highlighted that it was undoubtedly the express terms of a contract that took precedence over any custom and trade usage.[935] At the same time, in cases where a contract did not specify in detail some particular aspects or left them open to broader interpretation, industry

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[928] For example, arbitral tribunals rightly rejected the existence of such customs and usages as specific sulphur content in Nigerian oil (see *London Arbitration 3/95* (1995) 401 LMLN 4 dated 18 March 1995), Saturday mornings as holidays in Romania (*London Arbitration 15/97* (1997) 465 LMLN 4 dated 30 August 1997), any specific interpretation of speed and consumption warranties due to the use of the word 'about' (*London Arbitration 12/85* (1985) 158 LMLN 4 dated 21 November 1985), maximum allowance of bunkers supply in Iraq under UN sanctions (*London Arbitration 13/04* (2004) 645 LMLN 3 dated 4 August 2004) and any additional implied duties of the master of the ship (*London Arbitration 18/07* (2007) 722 LMLN 4 dated 18 July 2007; *London Arbitration 11/89* (1989) 248 LMLN 4 dated 6 May 1989).

[929] (2001) 563 LMLN 3 dated 7 June 2001.

[930] Dated 7 January 1982.

[931] Some other examples include the LMAA award (*London Arbitration 16/82* (1982) 74 LMLN 3(3) dated 2 September 1982) in which the arbitrators agreed with the charterers that it was usual for demurrage to be settled on production of documents after completion, where there had been no exceptional delay in loading or discharge. However, they continued, this did not amount to a settled custom or practice and therefore the arbitrators saw no reason to depart from the legal norm expressed in the *obiter dictum* by Lord Diplock in *The Dias* [1978] 1 W.L.R. 261 that damages were payable as soon as they were incurred. Also, see *London Arbitration 18/87* (1987) 209 LMLN 2(2) dated 7 November 1987 wherein the dispute was as to whether the birthday of Thomas Gleason (then president of the International Longshoremen's Association) was considered a holiday. The charterers based their arguments on the custom, whereas the owners based theirs on the governing law of the contract under which there was no such legal holiday. The arbitrators in this case found in favour of the owners.

[932] Dated 29 September 1992.

[933] The same logic can be found in other arbitrations, see, for example, *SMA award No. 3885* dated 25 May 2005; *SMA Award No. 1989* dated 30 May 1984; *SMA Award No. 4188* dated 22 October 2012, etc.

[934] Dated 9 March 2018.

[935] Reference was also made to the *SMA Award No. 3782* dated 20 April 2003.

and trade standards play an important role, especially with regards to dispute resolution.[936] In this arbitration case (*SMA Award No. 4338)*[937] the arbitrators referred to some documents published by the Oil Companies International Marine Forum, a voluntary association of oil companies having an interest in the shipment and terminalling of crude oil and oil products, finding them as best practices in an evolving industry. This is a crucial point given the fact that most contracts in shipping are made on the basis of model contracts developed by maritime industry associations. In fact, in most disputes the task of the SMA and the LMAA is to interpret relevant provisions of the model contract issued by a particular industry association, often by analysing other standards set by such an association or the maritime industry overall. Thus, in being engaged in such interpretation arbitrators often examine the relevance and validity of any model contract provisions and also develop certain benchmarks for particular maritime standards.

For example, in *SMA Award No. 3820*[938] the arbitral tribunal was faced with the task of interpreting a certain provision of the Inter-Club New York Produce Exchange Agreement 1996 with regards to negligence in the preparation of a soybean cargo for shipment. In doing so, the arbitrators concluded that based on generally accepted specifications, usages, practices and standards in the industry for the sale, testing and shipment of bulk soybean cargoes it would be wrong to conclude that the preparation and shipment of a soybean cargo with an average moisture content of 12.7% was negligence *per se*.

In *London Arbitration 15/17*[939] one of the issues before the tribunal was a clause in the charterparty based on the NYPE standard form requiring the charterers to promptly send invoices to the owners. The tribunal agreed with the charterers that it was standard industry practice nowadays to accept invoices in PDF format and not to send original copies as argued by the owners.

In *SMA Award No. 2975*[940] the tribunal went even further claiming that if the parties used a standard form contract to govern their relations, it provided reasonable grounds to conclude that they intended to adopt whatever industry usage, custom and practice attached to that particular provision.[941]

At the same time, there are a number of cases in which the LMAA and tribunals allocated a significant, and sometimes a decisive, role to a certain custom or commercial practice. For

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[936] *SMA Award No. 4338* dated 9 March 2018.
[937] Dated 9 March 2018.
[938] Dated 2 January 2004.
[939] (2017) 977 LMLN 3 dated 11 May 2017.
[940] Dated 30 April 1993. In fact, the arbitral tribunal stated that this case was decided on the basis of "U.S. general maritime law and our understanding of the customs and usages of the maritime industry".
[941] Similarly, in *SMA Award No. 2953* dated 26 February 1993 the tribunal, interpreting the provision with regards to the dates that are generally recognised as holidays in the USA and Bangladesh, stated that "contract provisions should be interpreted as consistent with each other *and with any relevant course of dealing or usage of trade*" [emphasis added], and decided that business practices and usages require that in Muslim countries Friday is a day of rest in place of Sunday.

example, in *SMA Award No. 2771*[942] the arbitrators found the calculations of both parties to be flawed on the basis of a recognised modern usage and numerous New York arbitration awards that the prefix "about" to a speed warranty had been given a 1/2-knot margin, and that the qualification "under good weather conditions" had generally been interpreted to mean that actual performance is determined by the average speed during good weather days only. In *London Arbitration 11/94*[943] and *London Arbitration 8/06*[944] the key arguments for the respective tribunals were that the cargo was packed in a way that had been customary for many years and that the packaging was customary for the trade. In *London Arbitration 18/98*[945] the tribunal agreed with the owners' argument that it was the custom of the trade for all fertilisers carried to India to be full loads.[946]

In addition to the above, there are a variety of examples of LMAA and SMA awards with regards to the interpretation and application of such terms as 'customary assistance', 'customary anchorage', 'customary waiting place', 'customary manner'.[947] As explained in *SMA Award No. 3996*[948] the term "customary" is commonly understood to embrace a broad range of established practices which are prevalent, predictable, lawful, are of uniform usage and are known to those engaged in a given trade. Quite often these terms are used in relation to local ports and customs (unwritten rules) established therein.[949]

4.5. Dispute resolution within *lex informatica*

4.5.1. The leading dispute resolution authority

As was identified in section 2.3.3 of Chapter 2, the ICANN, a hybrid private-state institution, provides global governance within *lex informatica*. However, it does not render any dispute resolution services; instead it promulgated the Uniform Domain Name Dispute Resolution Policy (the UDRP) as the global instrument for dispute resolution with regards to domain name regulation.

The UDRP was developed by the World Intellectual Property Organisation (WIPO) at request

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[942] Dated 11 July 1991.

[943] (1994) 387 LMLN 3 dated 3 September 1994.

[944] (2006) 688 LMLN 2 dated 27 March 2006.

[945] (1998) 492 LMLN 2 dated 15 September 1998.

[946] See also *SMA Award No. 2817* dated 16 December 1991, wherein the tribunal decided in favour of the charterers, accepting their argument that in the absence of clear and specific provisions in the charterparty, delivery and redelivery must be based on local times and not on GMT; reliance was made on several SMA arbitration awards, historic usage and trade acceptance. See also *London Arbitration 11/99* (1999) 510 LMLN 4(2) dated 27 May 1999 wherein the tribunal concluded that, based on customary practice the owners, not the charterers, met the cost of pilotage and tugs in a voyage charter. Similarly, in *London Arbitration 14/84* (1984) 126 LMLN 3(2) dated 30 August 1984 it was resolved that, based on current practice, owners have a responsibility to clean sludge tanks.

[947] See, for example, *London Arbitration 6/07* (2007) 716 LMLN 1 dated 25 April 2007, *London Arbitration 12/06* (2006) 698 LMLN 1 dated 16 August 2006, *London Arbitration 16/04* (2004) 647 LMLN 2 dated 1 September 2004, *London Arbitration 6/04* (2004) 636 LMLN 1(2) dated 31 March 2004, *London Arbitration 7/99* (1998) 505 LMLN 3 dated 18 March 1999, *London Arbitration 9/94* (1994) 387 LMLN 1 dated 3 September 1994, *London Arbitration 24/91* (1991) 315 LMLN 2 dated 30 November *1991*, *London Arbitration 5/90* (1990) 274 LMLN 4 dated 5 May 1990.

[948] Dated 24 February 2008.

[949] See, for example, *SMA Award No. 3585* dated 12 January 2000; *SMA Award No. 3382* dated 18 August 1997; *SMA Award No. 1468* dated 23 June 1980; *SMA Award No. 1049* dated 17 August 1976; *SMA Award No. 215* dated 22 November 1966; *SMA Award No. 4348* dated 29 August 2018

of the ICANN in 1999.[950] The UDRP was intended to provide swift, convenient and efficient dispute resolution procedure[951] which is specifically applicable to the global nature of cyberspace, *i.e.* transcending any national jurisdiction boundaries.[952] It is often treated as the ICANN's first global public policy.[953]

Unlike the examples above from *lex sportiva* and *lex maritima*, the dispute resolution policy of the ICANN differs significantly. To start with, the nature of the UDRP is not easily identified. Contrary to the opinions of some authors,[954] it is not an arbitration process per se, but a hybrid system,[955] with some even stating that its novelty makes it "closer to the medieval law merchant than to modern arbitration and represents economic efficiency on a global scale".[956] It has indeed received a great deal of attention and analysis from scholars and practitioners due to its novelty, especially in the beginning of this millennia when it was introduced. At the same time, the UDRP is procedurally similar to arbitration: there is a panel consisting of private adjudicator(s) which produces a binding decision, it is contractual in nature, etc.

However, a closer analysis reveals many significant differences. For example, the panel may consist of either one or three members from the applicable lists maintained by the dispute resolution centre providers.[957] In case of a sole member, it is not the parties, but the dispute resolution centre provider who chooses that person. However, if the respondent wants to have a three-member panel, then it is mandatory to have three panellists and each of the parties

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[950] 'World Intellectual Property Organization Recommendations' (*ICANN*, 27 May 1999) <https://features.icann.org/1999-05-27-world-intellectual-property-organization-recommendations> accessed 20 September 2019; Final Report of the WIPO Internet Domain Name Process (WIPO Publication No. 92-805-0779-6, 30 April 1999); Musiani (n 138) 47. Interestingly, some compare this collaboration between a public international organisation and a private non-governmental organisation with the work the ICC is doing in developing its soft law rules in consultation with UNCITRAL, see Holger Hestermeyer, 'The Invalidity of ICANN's UDRP Under National Law' (2002) 3 Minnesota Intellectual Property Review 1, 20-21.

[951] Julia Hornle, 'The Uniform Domain Name Dispute Resolution Procedure: Is Too Much of a Good Thing a Bad Thing' (2008) 11 SMU Science & Technology Law Review 253; Lisa Sharrock, 'The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions From Within the UDRP Framework' (2001) 51 Duke Law Journal 817, 819.

[952] Laurence Helfer, 'International Dispute Settlement at the Trademark-Domain Name Interface' (2001) 29 Pepperdine Law Review 87; Peter Chan, 'The Uniform Domain Name Dispute Resolution Policy as an Alternative to Litigation' (2002) 12 Murdoch University Electronic Journal of Law.

[953] Klein (n 331) 203.

[954] See, for example, Amanda Rohrer, 'UDRP Arbitration Decisions Overridden: How Sallen Undermines the System' (2003) 18 (2) Ohio State Journal on Dispute Resolution 563; Stephen Ware, 'Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP' (2002) 6 Journal of Small and Emerging Business Law 145. In fact, many UDRP panels in the early days of the functioning of the system used the word 'arbitration' to characterise the UDRP process or named themselves as 'arbitrators', see, for example, *VoiceStream Wireless Corporation v. Click5 a/k/a Mike Torres, a/k/a Dallas Internet Services, a/k/a Global Medical Products, a/k/a American Medical*, Case No. D2002-0190, WIPO Administrative Panel Decision dated 7 May 2002; *Deutsche Messe AG v. Kim Hyungho*, Case No. D2003-0679, WIPO Administrative Panel Decision dated 13 November 2003; *Expedia, Inc. v. Johuathan Investments*, Inc., Case No. D2001-0516, WIPO Administrative Panel Decision dated 28 June 2001, etc.

[955] Sharrock (n 951) 829; Laurence Helfer and Graeme Dinwoodie, 'Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy' (2001) 43 William & Mary Law Review 141; Elizabeth Woodard, 'The UDRP, ADR, and Arbitration: Using Proven Solutions to Address Perceived Problems with the UDRP' (2009) 19 Fordham Intellectual Property, Media & Entertainment Law Journal 1169.

[956] Colm Brannigan, 'The UDRP: How Do You Spell Success?' (2004) 5(1) Digital Technology Law Journal 2.

[957] See, for example, the list maintained by the WIPO: 'WIPO Domain Name Panelists' (WIPO, [no date]) <https://www.wipo.int/amc/en/domains/panel/panelists.html> accessed 20 September 2019. At the same time, whilst the Rules for the UDRP use permissive language (see paragraphs 3(b)(iv), 5(c)(v) and 6(d) – "may be drawn from any ICANN-approved Provider's list of panellists"), in practice all panellist are chosen from the relevant lists of the dispute resolution centre providers.

shall submit a list of five prospective panellists it wishes to have.[958] Unlike arbitration, the scope of the UDRP is limited to disputes between a domain name registrant and a third party over the abusive registration and use of domain names in generic and country code top-level domains.[959]

Furthermore, whilst the UDRP is contractual in nature, such contractual relations, in essence, are obligatory. The ICANN set a requirement that incorporation of the UDRP is a pre-condition for any domain name registration.[960] At the same time, there is no exclusivity in dispute resolution via the UDRP. The parties may refer their dispute to a competent court before, during and even after the proceedings under the UDRP (albeit within 10 days limit).[961] In addition, a panel under the UDRP is also limited in the remedies it can award: either to the transfer or to cancel the disputed domain name.[962] However, such remedies are easily enforced through domain names registrars. Thus, the UDRP has been characterised as self-enforcing.[963]

The other notable difference is that UDRP is administered through several dispute-resolution centres, which must be approved by the ICANN. As of the time of writing, there are five such centres: the Arab Center for Domain Name Dispute Resolution (the ACDR), the Asian Domain Name Dispute Resolution Centre (ADNDRC), the Czech Arbitration Court Arbitration Center for Internet Disputes (CAC), the National Arbitration Forum (NAF) and the WIPO[964] (the latter two are the biggest providers by number of administered cases). The ICANN is concerned that the UDRP should be applied uniformly in all of these centres: whilst the centres are required to maintain their own sets of supplemental rules (dealing with the guidelines for submissions style, fees, etc.),[965] such rules cannot be inconsistent with the UDRP and the Rules for the UDRP,[966] because otherwise the ICANN may disallow the centre to carry on resolving disputes under the UDRP.[967] Notably, even the form of decisions at these centres is more or less unified with the same sections and points included. At the same time, it seems that there is competition among the abovementioned ICANN-approved centres which mostly relates to the practices included in the supplemental rules.[968]

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[958] Paragraph 6 of the Rules for the UDRP.

[959] See paragraph 1 of the UDRP; Jan Janssen, 'ICANN dispute resolution procedures' (*Getting the Deal Through*, 02 June 2017) <https://gettingthedealthrough.com/area/65/article/29097/domains-domain-names-2017-icann-dispute-resolution-procedures/ > accessed 20 September 2019.

[960] See note 2 to the UDRP.

[961] See paragraph 4(k) of the UDRP,

[962] See paragraph 4(i) of the UDRP.

[963] Hornle (n 951) 254; Klein (n 331) 203.

[964] 'List of Approved Dispute Resolution Service Providers' (ICANN, 25 February 2012) <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> accessed 20 September 2019.

[965] Paragraph 1 of the Rules for the UDRP.

[966] UDRP Providers and Uniformity of Process – Status Report (ICANN, July 2013).

[967] ibid.

[968] See, for example, letters of WIPO to ICANN, 'Letter of WIPO to ICANN dated 29 November 2007' (WIPO, 29 November 2007) <https://www.wipo.int/export/sites/www/amc/en/docs/icann291107.pdf> accessed 20 September 2019; 'Letter of WIPO to ICANN dated 4 July 2007' (WIPO, 4 July 2007) <https://www.wipo.int/export/sites/www/amc/en/docs/icann040707.pdf> accessed 20 September 2019.

4.5.2. Publication of decisions and use of precedents

The UDRP provides for publication of all their decisions in full online, except when a panel determines that there is an exceptional case to redact portions of a decision.[969] Thus, this resulted in a large amount of disputes brought by the parties. In fact, the WIPO, the first and the most used provider of UDRP services, claims that it had administered more than 39,000 cases by 2017.[970] The database of the National Arbitration Forum, the second most commonly referred to provider of the UDRP, includes more than 25,500 cases.[971] Importantly, details of all these cases are freely available through the databases run within these centres.

The UDRP does not provide for a strict doctrine of binding precedent. However, for the sake of the overall credibility of the system and reasonable anticipation of the same result from similar facts and circumstances, the UDRP panels strive for consistency with prior decisions.[972] Thus, the parties and panels refer to past decisions very often. Due to the number of cases handled under the UDRP it is not possible to thoroughly examine each particular instance of reference to the previous UDRP case law. However, a couple of small-scale studies have been performed with regards to the use of precedents in the proceedings under the UDRP. Notably, the findings in these studies proved to be consistent with each other: previous UDRP decisions have been cited in nearly 80% of cases with an average of 6.2-6.4 decisions per citing case.[973]

In addition, the WIPO maintains two useful lists: '25 Most Cited Decisions in Complaint'[974] and '25 Most Cited Decisions in Response'.[975] Whilst the numbers in the latter are quite modest (none of the cases was cited more than 300 times), which might be attributed to the fact that quite often respondents do not provide any answer to the claim and the proceedings carry on without them, the data in the former is astonishing. For example, *Telstra Corporation Limited v. Nuclear Marshmallows*[976] was cited more than 7,300 times, *Veuve Clicquot Ponsardin, Maison Fondee en 1772 v. The Polygenix Group Co.*[977] and *Oki Data Americas, Inc. v. ASD,*

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[969] See paragraph 4(j) of the UDRP and paragraph 16(b) of the Rules for the UDRP.

[970] 'Total Number of WIPO Domain Name Cases and Domain Names by Year' (WIPO, 2018) <https://www.wipo.int/export/sites/www/pressroom/en/documents/pr_2018_815_annexes.pdf#annex1> accessed 20 September 2019.

[971] 'National Arbitration Forum' (NAF, [no date]) <https://www.adrforum.com/> accessed 20 September 2019.

[972] See 4.1 at WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (WIPO Jurisprudential Overview 3.0, 2017) <https://www.wipo.int/amc/en/domains/search/overview3.0/> accessed 20 September 2019.

[973] See Kaufmann-Kohler (n 138) 367; Andrew Christie, 'Online Dispute Resolution – The Phenomenon of the UDRP' (2014) University of Melbourne Legal Studies Research Paper No. 681.

[974] '25 Most Cited Decisions in Complaint' (*WIPO*, [no date]) <https://www.wipo.int/amc/en/domains/statistics/cases_cited.jsp?party=C> accessed 20 September 2019.

[975] '25 Most Cited Decisions in Response' (*WIPO*, [no date]) <http://www.wipo.int/amc/en/domains/statistics/cases_cited.jsp?party=R> accessed 20 September 2019.

[976] Case No. D2000-0003, WIPO Administrative Panel Decision dated 18 February 2000.

[977] Case No. D2000-0163, WIPO Administrative Panel Decision dated 09 May 2000.

Inc.[978] – almost 2,500 times each and *Guerlain S.A. v. Peikang*[979] on more than 2,000 occasions. Overall, the 25 cases mentioned as the most cited in WIPO in sum were mentioned on more than 34,000 occasions.

While there are no such statistics with regards to the use of past cases by the panel, a brief examination of WIPO Decisions shows that such practice is very common. The same applies to other ICANN-approved centres. Notably, the parties and panels often cite cases which were decided in other ICANN approved centres.[980]

At the same time it is worth noting that such huge number of the decided cases inevitably result in some inconsistences in the treatment and application of the UDRP, which has been noted by some authors who suggested that the UDRP should be enhanced through the introduction of an appeal process.[981] However, this would inevitably result in the complication of the system and increase time and money expenses of the parties, which is clearly against the core aim of the UDRP.[982] Perhaps, the approach taken by WIPO with regards to the overview of the key issues and approaches expressed by its panel decisions in a freely accessible document might be a more desirable option in unifying practice under the UDRP.[983]

Some other drawbacks of the system have been identified, such as leniency towards favouring corporate trademark holders, lack of transparency with regards to the appointment of the panellists by the dispute service providers, strict procedural deadlines, etc.[984] However, generally the system has been positively met by the legal community,[985] which is also proved

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[978] Case No. D2001-0903, WIPO Administrative Panel Decision dated 06 November 2001.

[979] Case No. D2000-0055, WIPO Administrative Panel Decision dated 27 March 2000.

[980] See, for example, *Mile, Inc. v. Michael Burg*, Case No. D2010-2011, WIPO Administrative Panel Decision dated 07 February 2011 mentioning a case decided by the NAF; *The Toronto-Dominion Bank v. Andrew Smyth / kapuka*, Claim Number: FA1809001808923, NAF Decision dated 22 October 2018 mentioning a case decided by WIPO; *SellAnyCar.com FZE vs. Mr. Faiyaz Chand*, Case No. A2017-0003, ACDR Administrative Panel Decision dated 5 February 2018 mentioning cases decided by WIPO and NAF; *Accor v. Hulmiho Ukolen*, Case No. 101637, CAC Panel Decision dated 04 September 2017 mentioning cases decided by WIPO; *Anesta, LLC v. Truth MD LLC*, Case No. 100969, CAC Panel Decision dated 29 May 2015 mentioning cases decided by WIPO and NAF; *Hess Corporation v. Much Media S.A.*, Claim Number: FA0808001222043, NAF Decision dated 13 October 2008 mentioning cases decided by ADNDRC and WIPO, and many other.

[981] See, for example, Scott Donahey, 'A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy' (2001) 18 Journal of International Arbitration 131; Elizabeth Thornburg, 'Fast, Cheap and Out of Control: Lessons from the ICANN Dispute Resolution Process' (2002) 6 Journal of Small and Emerging Business Law 191; Hornle (n 951) 279.

[982] Milton Mueller, 'Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy' (2001) 17 (3) The Information Society 151; Woodard (n 955).

[983] See WIPO Overview of WIPO Panel Views on Selected UDRP Questions (n 972). In fact, panels often refer to such overviews in support of their arguments, see, for example, *Philip Morris USA Inc. v. ADN HOSTING*, Case No. D2007-1609, WIPO Administrative Panel Decision dated 26 December 2006; *The Dallas Morning News, Inc. and The Belo Company v. WhoisGuard, Inc., WhoisGuard Protected / Nicolas Stewart*, Case No. DCO2017-0019, WIPO Administrative Panel Decision dated 13 July 2017; *Accor v. Jiang Li*, Case No. D2017-0958, WIPO Administrative Panel Decision dated 22 July 2017; *Instagram, LLC v. Omer Ulku*, Case No. D2018-1700, WIPO Administrative Panel Decision dated 17 September 2018, etc.

[984] Hornle (n 951) 289; Sharrock (n 951); Helfer (n 952); Keith Blackman, 'The Uniform Domain Name Dispute Resolution Policy: A Cheaper Way to Hijack Domain Names and Suppress Critics' (2001) 15 (1) Harvard Journal of Law & Technology 211; Michael Froomkin, 'ICANN's "Uniform Dispute Resolution Policy"- Causes and (Partial) Cures' (2002) 67 Brooklyn Law Review 605. At the same time, see Woodard (n 955), who notes that some of the criticisms targeted at the UDRP are not appropriate due to the failure of the authors to analyse the system in a proper context or due to the fact of a hybrid, and thus the poorly understood, nature of the UDRP.

[985] Woodard (n 955); Luke Walker, 'ICANN's Uniform Domain Name Dispute Resolution Policy' (2000) 15 Berkeley Technology Law Journal 289; Rohrer (n 954); Musiani (n 138) 28-29; Christie (n 973).

by the number of cases handled since its inception.[986] In fact, the success in the implementation of the UDRP has given a fertile ground for many academic studies with regards to the introduction of similar transnational dispute resolution systems not attached to any national jurisdiction.[987]

4.5.3. Reliance on existing and development of new industry-specific principles, customs, usages and practices through dispute resolution

The cases resolved on the basis of the UDRP do not operate with the notion of *lex informatica*. As provided in paragraph 15 of the Rules for the UDRP, a Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the UDRP, the Rules for the UDRP and any rules and principles of law that it deems applicable. Thus, it is not surprising that the main basis for dispute resolution is the UDRP provisions. Given the scope of the system, all the cases are limited to one provision of the UDRP, namely 4(a), which is often used with the qualifying circumstances as provided in 4(b) and 4(c). Thus, the task of any panel under the UDRP is to evaluate as to whether a claimant or respondent fully satisfied the requirements test as set out in the abovementioned provisions, namely (in case of a claimant) that (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; (ii) the claimant has no rights or legitimate interests in respect of the domain name; and (iii) the disputed domain name has been registered and is being used in bad faith.

Therefore, all the case law of the ICANN-approved centres is set around interpretation and application of the above provision. Notably, as stressed above, in doing so all the centres should be uniform in their application and interpretation, which results in that cases decided in one centre are successfully used in support of a claim or defence in the centres.

Paragraph 15 of the Rules for the UDRP also provides that a panel may refer to any rules and principles of law that it deems applicable. Based on the UDRP practice, it is clear that rules in this context means national law. There are quite a number of cases wherein a claimant used reference to a national legal act as another basis, in addition to the UDRP, for a claim. Due to the global nature of cyberspace and its diverse community of its users, there is a great variety of such acts and I have found references to, for example, the Swiss Federal Law against Unfair Competition 1986 and the Swiss Federal Act on the Protection of Trade Marks and Indications of Source 1992, the US Anticybersquatting Consumer Protection Act 1999 and the Trademark Act 1946, the German Act on the Protection of Trade Marks and other Signs 1994, the Japanese Unfair Competition Prevention Act 1993, the Finnish Trademarks Act 1964, the

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[986] Sharrock (n 951) 831.

[987] See, for example, Sharrock (n 951); Laurence Helfer, "International Dispute Settlement at the Trademark-Domain Name Interface" (2001), 29 Pepperdine Law Review 87; Mueller (n 982); Wanwipar Puasiri, 'The Uniform Dispute Resolution Policy: A Comparative Study of Nominet, .eu ADR, US and UK Legal System to Find a Proposal for an Amendment' (PhD thesis, Queen Mary University of London 2010).

Danish Trademark Act 1986 and Marketing Practices Act 2000, the Canadian Trade Marks Act 1985, etc. However, these references to national acts are exclusively made by the parties, not by the panels (although panels are frequently analysing the appropriate reference if made by the party), and only in the context of the UDRP, *i.e.* as an additional support of one of the elements of paragraph 4(a). In addition, I was unable to identify any single decision of any ICANN-approved centre in which a party relied on a court judgment, unless mentioning prior or pending proceedings in relation to the presented case.

The interesting issue is the use of principles of law. In this context it is notable that an empirical study conducted by Simon showed, *inter alia*, that most often there is no reference to any national law is made and cases are resolved on the basis of the UDRP interpretation.[988]

Following research of ICANN-approved centres databases of rendered decisions it seems that there are three concepts of principles of law used in relation to UDRP dispute resolution: principles of law of a particular jurisdiction, general principles of law and industry-specific principles of domain name regulation.

It appears from the UDRP case law that when both parties are from the same jurisdiction, panels tend to refer to the principles of the law of that jurisdiction[989] or the principles of law set out in decisions of the courts of that jurisdiction,[990] although rarely any specific principles or court judgments are mentioned. One of these rare instances was in *Koninklijke Philips Electronics N.V. v. Cun Siang Wang*[991] wherein the panel applied the principle of exhaustion of rights, *i.e.* the owner of a trademark cannot object to the resale of goods which it has placed on the market bearing the trademark unless there is some good reason. The panel referred to several US and German court judgments as well as a number of judgments rendered by the European Court of Justice, in which this principle was used, and then extended its use to an international context. Notably, even if a panel decides to use any specific principles of law, such usage is limited to the assistance in determining whether a party has met the test as set

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[988] David Simon, 'An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy' (2012) 53 Boston College Law Review 65.

[989] See, for example, *Cellular One Group v. IP Services*, Case No. D2000-1035, WIPO Administrative Panel Decision dated 06 November 2000; *Ty, Inc., v. O.Z. Names*, Case No. D2000-0370, WIPO Administrative Panel Decision dated 27 June 2000; *Caja de Ahorros Municipal de Burgos v. Pablo Iglesias Junco*, Case No. D2007-1548, WIPO Administrative Panel Decision dated 05 December 2007; *Alfred Berg Holding Aktiebolag v. P D S*, Case No. D2008-0566, WIPO Administrative Panel Decision dated 23 May 2008; *Institut Gestalt, S.L. v. Joan Cintero S.L.*, Case No. D2008-1842, WIPO Administrative Panel Decision dated 26 January 2009; *Government of Canada v. David Bedford a.k.a. DomainBaron.com*, Case No. D2001-0470, WIPO Administrative Panel Decision dated 30 June 2001. This largely corresponds to the findings in Simon (988) 90-92.

[990] See, for example, *Copart, Inc. v. SalvageNow*, Case No. D2000-0417, WIPO Administrative Panel Decision dated 28 June 2000; *America Online, Inc. v. Cyber Network LLP*, Case No. D2000-0977, WIPO Administrative Panel Decision dated 29 September 2000; *Ameritrade Holding Corporation and Ameritrade (Inc.) v. Pangea Holdings Ltd.*, Case No. D2000-0971, WIPO Administrative Panel Decision dated 23 October 2000; *Revlon Consumer Products Corporation v. Yoram Yosef aka Joe Goldman*, Case No. D2000-0468, WIPO Administrative Panel Decision dated 27 July 2000.

[991] Case No. D2000-1778, WIPO Administrative Panel Decision dated 15 March 2001.

out in paragraph 4 of the UDRP.[992]

The panels also referred to general principles of law. In *Grove Broadcasting Co. Ltd v. Telesystems Communications Limited*[993] the complainant filed a claim for the second time after the first unsuccessful attempt. It claimed that such unsuccessful result was due to the fact that it had not received any legal assistance and had not been able to obtain the information within the short time limits available imposed. Since there is no provision in the UDRP with regards to the procedural aspect of re-filing complaints, the panel analysed this issue in detail. Thus, it drew the analogy with the well-understood rules and principles of law relating to the re-litigation of cases determined after a defended hearing. Notably the panel stated that it is not appropriate to refer to a particular legal system in order to seek assistance in this matter, but chose to resort to the broad principle found in most common law jurisdictions (since the parties were from Jamaica and the USA, both being common law jurisdictions), identifying that re-hearing of the already decided matter is only possible under limited circumstances.[994] Furthermore, the panel also referred to UNCITRAL Model Law on International Commercial Arbitration 1985, in particular to Article 34 "Application for setting aside as exclusive recourse against arbitral award", finding it as a useful analogy to clarify the issue in the dispute. Thus, the sole panellist resolved that "the submission in this second case was merely an attempt to "patch-up" a deficiency in a previously presented case which cannot, by any stretch of the imagination, come within any of the limited grounds that I have endeavored to articulate for granting a rehearing".[995]

Similarly, the re-filed complaint was the subject issue in *Creo Products Inc. v. Website In Development*.[996] The panel in this case referred to the position expressed in *Grove Broadcasting Co. Ltd v. Telesystems Communications Limited* and elaborated the approach further. Thus, it stated that the issue of re-filing should be resolved by logic, by common sense and by analogy with general principles of law relating to re-litigation of cases. At the same time, the panel emphasised that a distinction should be drawn between (i) re-filed complaints that concern the act which formed the basis of the original complaint, and (ii) re-filed complaints that concern acts which have occurred subsequent to the decision on the original complaint. The refined complaint in *Grove Broadcasting Co. Ltd v. Telesystems Communications Limited* is the first type and concerns the use of the well-established concept of *res judicata* (a matter that has been adjudicated by a competent court and therefore may not be pursued further by

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[992] See, for example, *Revlon Consumer Products Corporation v. Yoram Yosef aka Joe Goldman*, Case No. D2000-0468, WIPO Administrative Panel Decision dated 27 July 2000; *The Bonita Bay Group, Inc. et al. v. Total Concept, Inc.*, Case No. D2003-0126, WIPO Administrative Panel Decision dated 8 April 2003; *Russell H. Fish v. Robert Farris d/b/a Virtual Clicks*, Case No. D2005-1035, WIPO Administrative Panel Decision dated 24 November 2005; *Finter Bank Zurich v. Gianluca Olivieri*, Case No. D2000-0091, WIPO Administrative Panel Decision dated 23 March 2000.

[993] Case No. D2000-0703, WIPO Administrative Panel Decision dated 10 November 2000.

[994] In support of this finding the panel also cited two judgments from England and New Zealand, namely *Ladd v Marshall* [1954] 3 All ER 745, 748 and *Dragicevich v Martinovich* [1969] NZLR 306, 308.

[995] Case No. D2000-0703, WIPO Administrative Panel Decision dated 10 November 2000.

[996] Case No. D2000-1490, WIPO Administrative Panel Decision dated 19 January 2001.

the same parties). The panel in *Creo Products Inc. v. Website In Development* totally adhered to the findings in *Grove Broadcasting Co. Ltd v. Telesystems Communications Limited* and highlighted that whilst the grounds for re-filing the complaint are limited, they are not exhaustive.

However, the panel continued, for the second type of re-filed complaints the concept of *res judicata* does not arise, because the subsequent complaint concerns acts which occurred after the original decision and it is not an action upon which an adjudication has already taken place, *i.e.* the subsequent complaint is truly a new action under the UDRP. Notably, the panel did not stop there and stated that whilst the issue as to whether a re-filed complaint is either the first or second type must be determined on a case-by-case basis, some general principles should be specified. Thus, the panel identified five such principles, namely: (a) the burden of establishing that the re-filed complaint should be entertained under the UDRP rests on the re-filing complainant; (b) such burden is high; (c) the grounds which allegedly justify entertaining the re-filed complaint need to be clearly identified by the re-filing complainant; (d) the dispute resolution service provider with whom the re-filed complaint has been filed has responsibility for determining if, prima facie, the re-filing complainant has pleaded grounds which might justify entertaining the re-filed complaint; and (e) if the previous condition is satisfied (as well as the other formal requirements of the UDRP), the re-filed complaint should be submitted to an administrative panel for determination of whether the re-filed complaint should be entertained (and, if so, of the merits of the claim under the Uniform Policy).[997]

These five principles outlined in *Creo Products Inc. v. Website In Development* found a wide acceptance in further case law of the ICANN-approved providers and became a standard test performed in similar disputes.[998]

A further perspective on the issue of re-filed complaint was examined by a panel in *Sensis Pty Ltd., Telstra Corporation Limited v. Yellow Page Marketing B.V.*[999] Here the issue before the panel was as to whether the fact that the previous panel considered some unanticipated factual and legal material on its own initiative, *i.e.* not supplied by either of the parties, entitles a party to submit a re-filed complaint. The panellist here went on a lengthy analysis of the re-filing complain submission principles, referring to the previous abovementioned UDRP case law and drawing analogies from court rulings (from a variety of common and civil law jurisdictions, such as the US, England, Canada, New Zealand, Australia, Switzerland), statutes (French Code of

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[997] *Creo Products Inc. v. Website In Development,* Case No. D2000-1490, WIPO Administrative Panel Decision dated 19 January 2001.

[998] See, for example, *Furrytails Limited v. Andrew Mitchell d/b/a Oxford Die-Cast*, Case No. D2001-0857, WIPO Administrative Panel Decision dated 6 September 2001; *Talal Abu-Ghazaleh International, Talal Abu Ghazaleh & Co., Abu Gazaleh Intellectual Property and Aldar Audit Bureau v. Fadi Mahassel*, Case No. D2001-0907, *WIPO Administrative Panel Decision dated 13 September 2001; Jones Apparel Group Inc .v. Jones Apparel Group.com*, Case No. D2001-1041, WIPO Administrative Panel Decision dated 16 October 2001; *The Trustees of the University of Pennsylvania v. Moniker Privacy Services*, Motherboards.com, Case No. D2007-0757, WIPO Administrative Panel Decision dated 5 October 2007.

[999] Case No. D2011-0057, WIPO Administrative Panel Decision dated 15 March 2011.

Civil Procedure 2007, US Federal Rules of Civil Procedure 1938, the Dutch Code of Civil Procedure 1986, the English Civil Procedure Rules 1998) as well as the European Convention on Human Rights and the UNCITRAL Model Law on International Commercial Arbitration. Following their analysis, the panellists concluded that the nature of the UDRP is to provide an administrative procedure for the speedy and inexpensive resolution of a particular kind of dispute, so unlike civil litigation and some arbitration procedures, there is no discovery process, successive rounds of pleading and motions, or evidentiary hearings. Thus, UDRP panels should be reluctant to request or allow additional submissions that would substantially delay the proceedings or burden the parties. However, in the interests of achieving procedural fairness and reaching a just and informed decision it is helpful for a UDRP panel to request information and comments from the parties concerning new or reasonably unanticipated facts or legal issues, where that material could be dispositive and where it is reasonably subject to challenge or interpretation. Thus, a new procedural principle was elaborated and extensively used in further UDRP cases.[1000]

The last group of principles used under the UDRP are those elaborated by the panels and which are applied to resolve substantive law matters (that is why the above example in relation to the re-filed complaints does not fall under this category, because it deals with the procedural law matters). This is the area wherein *lex informatica* is most visible, because such principles are specific to the field and are actively used as a basis for resolving disputes.

The example of such is the principle that a reseller/distributor of trademarked goods or services can have rights or legitimate interests in a domain name which contains such trademark under certain circumstances. These circumstances were specified in *Oki Data Americas, Inc. v. ASD, Inc.*,[1001] hence the name of the principles, the Oki Data principles or Oki Data test.[1002] In particular, in order for a respondent to show that it satisfies the bona fide offering of goods, as provided in paragraph 4(c)(i) of the UDRP, it should, at least, meet several requirements, such as (a) the actual offering of goods and services at issue; (b) the use of the site to sell only the trademarked goods; (c) the site's accurately and prominently disclosing the registrant's relationship with the trademark holder; and (d) the respondent must not try to corner the market in all domain names, thus depriving the trademark owner of reflecting its own mark in a domain name. These principles have been widely applied by panels, referred to by parties in their

[1000] *Sport 2000 Brand AG v. MegaWeb.com Inc d/b/a sport2000, Case No. D2013-1890*, WIPO Administrative Panel Decision dated 1 January 2014.
[1001] Case No. D2001-0903, WIPO Administrative Panel Decision dated 6 November 2001.
[1002] See also 2.3 of WIPO Overview of WIPO Panel Views on Selected UDRP Questions (n 972).

submissions and further developed through UDRP case law.[1003]

Another specific well-established principle to UDRP is that the use of a generic or common name gives rise to a right or legitimate interest in the domain name provided that it is not used to target a trademark or its owner or to engage in other inappropriate conduct that is deleterious to a complainant.[1004] The procedural side of the application of this principle results in that it is the burden of the complainant to provide sufficient evidence that the disputed name has become a distinctive identifier associated with the complainant or its goods or services.[1005]

At the same time, "it is a well-established principle that descriptive or generic additions to a trademark, and particularly those that designate the goods or services with which the mark is used, do not avoid confusing similarity of domain names and trademarks".[1006] It is difficult to identify the panel decision that provided for the establishment of this principle in the UDRP dispute resolution, but evidence is that it is being followed quite extensively.[1007]

The principle of passive holding as bad faith domain usage was established in *Telstra Corporation Limited v. Nuclear Marshmallows*.[1008] In this case the panel concluded that passive holding constitutes bad faith domain usage within the meaning of paragraph 4(a)(iii) of the UDRP, if the following circumstances are present: (a) the complainant's trademark has a strong reputation and is widely known; (b) no evidence whatsoever of any actual or contemplated good faith use of a disputed domain name was provided by a respondent; (c) a respondent takes active steps to conceal its true identity, by operating under a name that is not a registered business name; (d) a respondent actively provided, and failed to correct, false contact details, in breach of its registration agreement; and (e) taking into account all of the above, it is not possible to conceive of any plausible actual or contemplated active use of a disputed domain name by a respondent that would not be illegitimate. This principle was further developed and

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[1003] Such as, for example, that unauthorised resellers may fall within the Oki Data principles (see *Research in Motion Limited v. One Star Global LLC*, Case No. D2009-0227, WIPO Administrative Panel Decision dated 09 April 2009; *Magma Products Inc. v. Herb Halling*, Case No. D2007-0995, WIPO Administrative Panel Decision dated 5 September 2007; *ITT Manufacturing Enterprises, Inc., ITT Corporation v. Douglas Nicoll, Differential Pressure Instruments, Inc.*, Case No. D2008-0936, WIPO Administrative Panel Decision dated 07 November 2008, etc.) and that pay-per-click websites would not normally fall within such principles where such websites seek to take unfair advantage of the value of the trademark (*Dr. Ing. h.c. F. Porsche AG v. Handelsprijzen.nl B.V.*, Case No. DNL2015-0051, WIPO Administrative Panel Decision dated 11 December 2015; *Shaw Industries Group, Inc., Columbia Insurance Company v. Texas Best Flooring Company Inc.*, Case No. D2011-0462, WIPO Administrative Panel Decision dated 11 May 2011, etc.).

[1004] See, for example, *Two Way NV/SA v. Moniker Privacy Services, LLC / [4079779]: Domain Administrator* Case No. D2012-2413, WIPO Administrative Panel Decision dated 07 June 2013; *S.C. ALTOM CONSULTING S.R.L. v. Domain Administrator, PortMedia and Moniker Privacy Services*, Case No. D2012-1326, WIPO Administrative Panel Decision dated 12 September 2012; *Fairview Commercial Lending, Inc. v. Aleksandra Pesalj*, Case No. D2007-0123, WIPO Administrative Panel Decision dated 16 April 2007.

[1005] See *Deanna S.p.A. v. Worldwide Media Inc.*, Case No. D2003-0964, WIPO Administrative Panel Decision dated 16 February 2004; *Continental Casualty Company v. Andrew Krause / Domains by Proxy, Inc.*, Case No. D2008-0672, WIPO Administrative Panel Decision dated 20 August 2008.

[1006] *eBay Inc. v. ebayMoving / Izik Apo,* Case No. D2006-1307, WIPO Administrative Panel Decision dated 31 January 2007.

[1007] See, for example, *Time Warner Entertainment Company, L.P. v. HarperStephens*, Case No. D2000-1254, WIPO Administrative Panel Decision dated 13 December 2000; *Enterprise Holdings, Inc. v. Enterprise Auto Sales, Ruben Leyva Castro*, Case No. D2013-2016, WIPO Administrative Panel Decision dated 29 January 2014.

[1008] Case No. D2000-0003, WIPO Administrative Panel Decision dated 18 February 2000.

applied in the subsequent cases.[1009]

The list of such specific, cyberspace and trademark principles can be easily extended to include other numerous instances. However, the key proposition here that all these principles have been applied by panels exclusively in the context of one UDRP provision [paragraph 4(a), which is often used with the qualifying circumstances as provided in 4(b) and 4(c)] and to assist the panellists to identify as to whether (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; (ii) the claimant has no rights or legitimate interests in respect of the domain name; and (iii) the disputed domain name has been registered and is being used in bad faith. In fact, the same proposition applies to other sources used during the UDRP proceedings, such as statutes, laws, court judgments, scholarly articles, official documents relating to the UDRP, such as ICANN and WIPO reports, etc;[1010] their task is to assist in the correct interpretation of the single UDRP provision.

The UDRP not only provides for procedural guidance, but also forms the applicable substantive law for dispute resolution within its limited scope.[1011] In fact, when analysing the UDRP Froomkin rightly characterised the policy as Internet standards and practices.[1012] Combined with the large number of cases and active use, as shown above, of references to previous case law, this results in an intrinsically developing non-static body of law by a non-state specialist body.

The fact that the UDRP provides for some substantive law elements detached from any national law regime to which panels often refer, interpret and further develop their application as well as wide acceptance of such practice by international business community led to the acknowledgment of the UDRP as the core source of *lex informatica*.[1013]

Notably, WIPO claims that despite having such an option, a losing party to the UDRP proceedings rarely seeks to file a case to court, and even when such filing happens, the courts have generally reached the same conclusion as did a UDRP panel.[1014] Whilst in the first couple of years of the functioning of the UDRP there had been some concerns with regards to the treatment of the UDRP proceedings under national laws,[1015] it seems that nowadays the courts

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[1009] See, for example, *UPM-Kymmene Corporation v. yongxi zhang*, Case No. D2009-0882, WIPO Administrative Panel Decision dated 24 August 2009; *Harrods Limited v. Zhang Fashu*, Case No. D2010-0414, WIPO Administrative Panel Decision dated 12 May 2010. For example, in *Compagnie Gervais Danone v. Yao Renfa*, Case No. D2008-0582, WIPO Administrative Panel Decision dated 30 June 2008 the panel added two more circumstances, namely the respondent being an individual rather than a business entity and failure of the respondent to answer the correspondence sent by the complainant.

[1010] *Sensis Pty Ltd., Telstra Corporation Limited v. Yellow Page Marketing B.V.*, Case No. D2011-0057, WIPO Administrative Panel Decision dated 15 March 2011.

[1011] Hornle (n 951) 254.

[1012] Froomkin, 'ICANN's "Uniform Dispute Resolution Policy"' (n 984) 716.

[1013] Patrikios, 'Resolution of Cross-Border E-Business Disputes' (n 138) 289; Benjamin Davis, 'The New New Thing Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers' (2000) 3 (4) The Journal of World Intellectual Property 525, 550.

[1014] The Uniform Domain Name Dispute Resolution Policy (UDRP) as a model for the Resolution of Intellectual Property Rights Disputes (WIPO Advisory Committee on Enforcement, 31 August 2015).

[1015] Hestermeyer (n 950).

have developed an adequate understanding of the system and rarely overturn UDRP decisions.[1016]

However, whilst the existence of such successful dispute resolution policy may be used by the proponents of the *lex informatica* theory, the issue here is that the scope of such system is extremely limited. Unlike the main dispute resolution systems within *lex sportiva* (the CAS) and *lex maritima* (the LMAA and the SMA), which can resolve most, if not all types of disputes, the UDRP dispute resolution covers only a marginal, albeit very important, aspect of cyberspace, namely registration and proper use of domain names.[1017]

The analysis above proves the existence of industry-specific, elaborate and sophisticated principles frequently referred to during dispute resolution proceedings under the UDRP. However, since these principles are used exclusively in the context of domain names, it is reasonable to conclude that currently the scope of *lex informatica* is limited to the framework concerned with the registration and use of domain names.

4.6. Dispute resolution within *lex petrolea*

4.6.1. The leading dispute resolution authority

It is typical for the petroleum industry to resolve their disputes either through arbitration or expert determination, with the former being more commonly used, with the latter getting increasingly popular as a platform for resolving specific technical disputes.[1018] However, other sources point out that expert determination is not widely chosen by the parties, with mediation being the second preferred option after arbitration.[1019]

The position of *lex petrolea* is somewhat peculiar because, unlike in other branches of *lex mercatoria*, it is not possible to identify any single specialised dispute resolution authority in the area. Notably, academic literature on the subject of *lex petrolea* frequently points to investment arbitration as the primary forum wherein the concept is used. Oil and gas disputes

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[1016] Although see a somewhat controversial practice of the UK courts, which interpret the UDRP in a manner that demonstrates that they do not have the jurisdiction to hear and determine an appeal against a decision taken by a UDRP panel, see *Yoyo.email Limited v. Royal Bank of Scotland Group PLC and Others*, [2015] EWHC 3509 (Ch) and *Pankajkumar Patel v Allos Therapeutics Inc.* [2008] EWHC 1730 (Ch). See also Laurence Helfer, 'Whither the UDRP: Autonomous, Americanized or Cosmopolitan?' (2004) 12 Cardozo Journal of International and Comparative Law 493.

[1017] There are suggestions that the scope of the UDRP should be expanded to cover other areas of internet-related disputes, see Wanwipar Puasiri (n 987).

[1018] Roberts (n 367) 394-396; Mark Clarke and Jessica Neuberger, 'Drafting effective dispute resolution clauses' in Ronnie King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2012) 12; Peter Edworthy and Ronnie King, 'International arbitration' in Ronnie King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2012) 38; Georgia Quick and Deborah Tomkinson, 'Alternative dispute resolution' in Ronnie King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2012) 70; Isenegger (n 254) 75. Although see the argument that expert determination is rarely used in Ted Greeno and Caroline Kehoe, 'Contract pricing disputes' in Ronnie King (ed.), Dispute Resolution in the Energy Sector: A Practitioner's Handbook (Globe Law and Business, 2012) 112.

[1019] See, for example, Martin, 'Dispute Resolution in the International Energy Sector' (n 255); 'Dispute Resolution in the Energy Sector' (Initial Report by the International Centre for Energy Arbitration 2015) 9-10.

are indeed one of the largest areas in investment arbitration.[1020] However, it is unlikely that investment arbitration can be viewed as the unique and particular specialised platform which provides for dispute resolution services for petroleum industry actors. There are several reasons for this.

In particular, as in many other dispute resolution forums discussed in the above sections, the requirement to follow previous cases is absent in investment arbitration rules. At the same time, in practice investment arbitrators often employ references to previous arbitral awards in order to provide a more solid basis for and establish increased legitimacy of their awards.[1021] This, to some extent, ensures consistency of investment arbitration awards in similar issues. However, the problem is that today a number of institutions provide investment arbitration dispute resolution services. The International Centre for Settlement of Investment Disputes (the ICSID) and the Permanent Court of Arbitration (the PCA) are two major players in the market, but several commercial arbitration institutions, such as the ICC, the London Court of International Arbitration (the LCIA) or the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC),[1022] have also been active in the attraction of investment disputes in recent years. It is also likely that some new investment arbitration forums will appear in the near future.[1023] Therefore, there is a need to have consistency in the treatment of case law from different investment arbitration service providers, akin to the one present between the SMA and the LMAA within *lex maritima*. Whilst several studies have shown that there is a clear trend of recognition of precedential value of previous cases at least within the ICSID arbitration,[1024] the question remains open as to whether investment arbitration centres will treat cases rendered by other investment arbitration providers, often competitors on the market, as valid precedents and in a harmonious manner.[1025]

Furthermore, as is well-known, investment arbitration is concerned with resolving disputes

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[1020] According to the official ICSID Caseload data, Oil, Gas and Mining disputes constitute around 24% of all disputes and Electric Power and Other Energy have a share of 17%. See ICSID (n 254). According to some other sources, it amounts to approximately 15% of all investment disputes (see Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 6). See also Isenegger (n 254) 76.

[1021] Martin, '*Lex Petrolea* in International Law' (n 100) 96; Tariq (n 241).

[1022] Whilst the share of investment disputes carried out by such institutions is marginal compared to the caseload of the ICSID or the PCA, it is nonetheless quite substantial if combined. For example, as of 2018 the SCC has administered 106 investment disputes and the ICC another 39 as of 2017, see 'Investment Disputes 2018' (SCC, 2018) <https://sccinstitute.com/statistics/investment-disputes-2018/ > accessed 20 September 2019; 'ICC Court releases full statistical report for 2017' (ICC, 31 July 2018) <https://iccwbo.org/media-wall/news-speeches/icc-court-releases-full-statistical-report-for-2017/ > accessed 20 September 2019.

[1023] Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012' (2012) 28 (4) Arbitration International 577, 590.

[1024] See, for example, Ridi (n 712); Niccolò Ridi, 'Mirages of an Intellectual Dreamland'? Ratio, Obiter, and the Textualization of International Precedent' (2018) King's College London Law School Research Paper No. 19-3; Kaufmann-Kohler (n 138); Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2006) 30 (4) Fordham International Law Journal 1014; although see Irene Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2012). Marquette Law School Legal Studies Paper No. 12-26.

[1025] In fact, there was a study on this subject, the results of which will be published in 2020, see Niccolò Ridi, 'Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement' in D. Behn, S. Gáspár Szilágyi, & M. Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence*? (Cambridge University Press 2020) [forthcoming].

between foreign investors and host states. When considering investment arbitration as a main platform for *lex petrolea* dispute resolution, the application of the concept is thereby solely limited to those disputes wherein there is any involvement of a state.[1026] Indeed, it is true that significant involvement of a state is one of the distinct features of the petroleum industry. Yet, disputes between commercial parties active in the oil and gas area should not be ruled out of the scope of *lex petrolea*, because otherwise the assumption is that *lex petrolea* exists specifically in the public investment domain and applicable exclusively when a state (or a state entity) is involved.

Moreover, there is a legitimate claim that the number of investment arbitration awards in the area of oil and gas is marginal in comparison with the amount of arbitral disputes resolved by commercial arbitration.[1027] Some authors support such claim by reference to respective statistics from the leading arbitral centres.[1028] However, two important factors should be borne in mind which might significantly undermine this disposition.

First, generally, commercial arbitration awards are rarely published, at least at present. Therefore, one may wonder as to what potential use such awards represent in practice if their availability is restricted. Of course, the counterargument might be that, in any event, there is a pool of (arbitration) experts in the area of petroleum disputes that are aware of many commercial arbitral awards in the area and share them among themselves.[1029] But then the question arises as to what general use such restricted knowledge can be put by the commercial parties active in the petroleum industry. The answer will be none, except, of course, for that closed pool of experts, who can generate additional income from consulting, advising or deciding disputes in the area of oil and gas.

Second, the statistics issued by the leading arbitration centres represent sectors rather than actual issues resolved. While the number of such disputes seems to be quite significant, there is a high probability that the overwhelming majority of the matters presented before commercial arbitral tribunals do not concern specifics or distinct principles of petroleum practice, such as in the reported investment arbitration awards as shown below. Additionally, in many arbitration institutions reference is made to general energy disputes, which are not limited exclusively to the oil and gas sector, but also include such categories as alternative energy, mining, climate

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[1026] In fact, the studies of Childs and especially Bishop are unconsciously suggesting this by mentioning only a handful of commercial arbitration awards.

[1027] The number of investment arbitration awards with regards to the oil and gas industry is around 70 since 1972, see Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 4-5; Martin, 'Dispute Resolution in the International Energy Sector' (n 255).

[1028] See, for example, Scherer (n 255) 3; Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 4. For example, according to the ICC, energy disputes were the second largest category in its 2018 caseload (after construction), see ICC Dispute Resolution 2018 Statistics, 13. Also, energy and resources disputes is the second largest category within the LCIA with 19% of all the 2018 caseload (although in 2017 it amounted to 24%), see LCIA (n 255).

[1029] De Jesús (n 241) 25-26; Wawryk (n 241) 32.

change, etc.[1030] Since *lex petrolea* is associated specifically with the petroleum industry, these disputes, becoming more numerous over the last decade, may constitute a large proportion of the energy sector disputes and therefore create a false impression of oil and gas disputes domination in commercial arbitration.

At the same time, it is not clear as to whether the petroleum community (or the wider energy community) is in favour of the establishment of a specialised arbitration institution in the area. On the one hand, there is a view that a specialised arbitration forum would not significantly raise the efficiency in dispute resolution of energy disputes.[1031] Such view may be supported by references to subject matters of the disputes in the petroleum industry, which, for the most part, concern general legal issues. Thus, there is no need to establish a specialised institution if the disputes submitted for its consideration would concern general legal issues arising out of a contract.

Alternatively, in the last couple of years there have been efforts to establish such specialised arbitral institution, albeit not in petroleum, but in the wider energy area.[1032] Therefore, the idea of specialised energy arbitration has not been set aside. In addition, there is some strong evidence that suggests that parties to energy disputes prefer such disputes to be resolved by a person with specialised technical knowledge in the field.[1033]

Nonetheless, at the time of writing there is no identifiable industry-specialised dispute resolution authority in the petroleum sector, which significantly precludes the consistent and coherent development of *lex petrolea*. Therefore, it is not possible to provide the analysis of published awards and references to past cases. For the reasons shown above, investment arbitration cannot qualify as an industry-specific forum for petroleum disputes. Thus, *lex petrolea* functions without a sector-specialised dispute resolution authority and hence does not satisfy the essential criteria for recognition as a separate branch of the modern *lex mercatoria*.

[1030] See, for example, Simon Manner and Tilman Niedermaier, 'Renewable Energy Disputes' in Maxi Scherer (ed), *International Arbitration in the Energy Sector* (OUP 2018) 86-106; Raphael Heffron, 'Mining Disputes' in Maxi Scherer (ed), *International Arbitration in the Energy Sector* (OUP 2018) 132-152; Annette Magnusson, 'Climate Disputes and Sustainable Development in the Energy Sector: Bridging the Enforceability Gap' in Maxi Scherer (ed), *International Arbitration in the Energy Sector* (OUP 2018) 384-401.

[1031] Mark Stadnyk, 'Global Geopolitics and International Energy Arbitration: a Report from the 4th Annual ITA-IEL-ICC Joint Conference' (Kluwer Arbitration Blog, 7 March 2017) <http://arbitrationblog.kluwerarbitration.com/2017/03/07/global-geopolitics-and-international-energy-arbitration-a-report-from-the-4th-annual-ita-iel-icc-joint-conference/ > accessed 20 September 2019.

[1032] See, for example, the Perth Centre for Energy and Resources Arbitration (Australia) which was established in November 2014 and the International Centre for Energy Arbitration (Scotland) which was formally established in 2013, but at the time of writing still has not developed its rules for arbitration. It also worth mentioning the Energy Arbitration Court (Hungary), which was established in 2008 and initially dealt with disputes exclusively between Hungarian parties, but in 2015 expanded its reach to international disputes as well. However, on 31 December 2018 this court was terminated and its competency was transferred to the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry.

[1033] See, for example the Initial Report by the International Centre for Energy Arbitration (n 1019) 8, in which the expertise of the decision maker was chosen as the most important factor in the dispute resolution process in the energy field; 2018 International Arbitration Survey (n 210) 29-31, where the majority of respondents argued that publicly available rosters of arbitrators with specialist industry/sector experience and more industry/sector-specialised arbitral institutions would make international arbitration more appropriate for energy disputes. Also, see the Energy Arbitrators List maintained by the International Centre for Dispute Resolution.

4.6.2. Reliance on existing and development of new industry-specific principles, customs, usages and practices through dispute resolution

It is widely acknowledged that *lex petrolea* is primarily intended to assist arbitrators in resolving petroleum disputes.[1034] As noted in section 2.3.1 of Chapter 2, the distinct feature of *lex petrolea*, is that investment arbitration disputes, not commercial ones, constitute its major source. In this regard, it is noteworthy that in his work published in 1997 Bishop argued that investment awards in the area of the petroleum industry "developed the beginnings of a *lex petrolea*".[1035] However, a closer analysis of Bishop's work reveals that he made this ambitious statement on the basis of only 11 arbitral awards.

Writing in 2011 Childs argued that the amount of the published awards and the variety of issues they address is sufficient to create *lex petrolea*.[1036] He reached such conclusion following examination of 26 arbitral awards since 1998. As Bishop before him, Childs mostly studied investment arbitration awards due to their wider availability. However, his analysis also includes two reported commercial arbitration awards.

One might wonder as to whether 37 arbitration awards (with 35 being investment arbitration awards) mentioned by Bishop and Childs is sufficient to justify the claim for the existence of *lex petrolea*, especially given that the arbitral tribunal in one of these awards specifically rejected such claim. However, this quantitative criticism is not the most serious drawback of Bishop's and Childs' statements: it is actually the content of these arbitral awards. Thus, the analysis (as shown below) of arbitrations mentioned by Bishop reveals that despite involving disputes within the oil and gas industry, the subject matter of such disputes relates either to a breach of general contract obligations and associated contract law issues[1037] or procedural issues concerning the functioning of international commercial arbitration in general.[1038] In fact, even the well acknowledged arbitral decision in *the Government of the State of Kuwait v The American Independent Oil Company (Aminoil)*, wherein Kuwaiti counsel argued the existence of *lex petrolea* (the argument which was rejected by the tribunal), concerned nationalisation and determination of the appropriate amount of compensation.

With regards to the arbitral awards mentioned by Childs, they primarily deal with contract law

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[1034] Roberts (n 367) 403; Tabari (n 100) 131.

[1035] Bishop (n 100) 64.

[1036] Childs, 'Update on *Lex Petrolea*' (n 100) 259.

[1037] *LIAMCO v. The Government of the Libyan Arab Republic,* award dated 12 April 1977; *BP Exploration Company (Libya) Limited v. The Government of the Libyan Arab Republic,* award dated 10 October 1973; *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. The Government of the Libyan Arab Republic,* award dated 19 January 1979; *AGIP S.p.A. v. People's Republic of the Congo,* ICSID Case No. ARB/77/1, Award dated 30 November 1979; *Amoco International Finance v. the Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 14 July 1987; *Phillips Petroleum Co. Iran v. the Islamic Republic of Iran, Iran-US Claims Tribunal,* award dated 29 June 1989; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 30 March 1989.

[1038] *Elf Aquitaine Iran (France) v. National Iranian Oil Company,* award dated 14 January 1982, *JOC Oil v. Sojuznefteexport,* USSR Chamber of Commerce and Industry, Award in Case No. 109/1980 dated 9 July 1984. See also Bowman (n 252); Saidov (n 140) 4-5.

issues,[1039] breach of obligation under the contract,[1040] taxation,[1041] export restrictions and change of monetary policy,[1042] and nationalisation.[1043] Some of the awards mentioned by Childs have a rather vague link to the petroleum industry and its regulation. For example, in *Chevron Corporation v Republic of Ecuador*[1044] the issue before the arbitral tribunal concerned the suspension of enforcement of a court judgment imposing a fine on a petroleum company for certain breaches of environmental obligations. Therefore, the awards mentioned by Bishop and Childs are only representative examples of arbitral cases in the oil and gas industry, which do not provide for the use or development of industry-specific principles, customs and/or usages. At best such awards include some limited evidence of how general legal principles and customs are specifically applied in oil and gas industry disputes, such as with regards to the standing of shareholders to sue in arbitration, stabilization clauses, internationalization of contracts, the protection of an investor's legitimate expectations, methods of quantifying damages and determination of appropriate compensation for expropriation in long-term projects.[1045] But these principles and customs are long-established and well-known and would be applied with certain peculiarities in other areas and fields of international commercial and investment law, which does not make them a distinct feature of *lex petrolea*.[1046] It is notable

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[1039] *F-W Oil Interests, Inc v Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award dated 20 February 2006; *RSM Production Corporation v La Republique Centrafricaine*, ICSID Case No. ARB/07/02, Award dated 7 December 2010; *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14, Award dated 11 March 2009; *Joint Venture Yashlar v Government of Turkmenistan*, ICC Case No. 9151, Interim Award dated 8 June 1999; *Bridas SAPIC v Government of Turkmenistan*, ICC Case No. 9058, Partial Award dated 25 June 1999; *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Award dated 3 February 2006; M*ohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 September 2009; *Occidental Petroleum Corporation v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Provisional Measures dated 17 August 2007; *Trans-Global Petroleum, Inc v Hashemite Kingdom of Jordan*, ICSID Case No ARB/07/25, Decision on Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008.

[1040] *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 September 2009; *ICC Case No. 11663,* Award (2003); *Bettis Group Inc v Profco Resources Ltd*, AAA Case No 77-T-168-00228-98, Award dated 9 September 2000; *Joint Venture Yashlar v Government of Turkmenistan*, ICC Case No. 9151, Interim Award dated 8 June 1999; *Chevron Corporation v Republic of Ecuador*, PCA Case No 2007-2, Partial Award on the Merits dated 30 March 2010; *Frontera Resources Azerbaijan Corporation v State Oil Company of the Republic of Azerbaijan,* award dated 16 January 2006; *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures dated 31 July 2009.

[1041] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador,* ICSID Case No ARB/06/21, Decision on Provisional Measures dated 19 November 2007; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador,* ICSID Case No ARB/08/6, Decision on Provisional Measures dated 8 May 2009; *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010; *Murphy Exploration and Production Company International v Republic of Ecuador*, ICSID Case No ARB/08/4, Award on Jurisdiction dated 15 December 2010; *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award dated 31 October 2011; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic, ICSID Case No. ARB/03/13,* Decision on Preliminary Objections dated 27 July 2006; *BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic,* ICSID Case No. ARB/04/8, Decision on Preliminary Objections dated 27 July 2006; *Wintershall Aktiengesellschaft v Argentine Republic,* ICSID Case No ARB/04/14, Award dated 8 December 2008; *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability dated 27 December 2010; *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Award dated 3 February 2006; *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No UN 3467, Final Award dated 1 July 2004.

[1042] *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability dated 27 December 2010.

[1043] *Mobil Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated 10 June 2010.

[1044] PCA Case No 2009–23 (pending).

[1045] Stadnyk (n 1031).

[1046] Saidov (n 140) 4-5. However, here Bowman makes one important reservation concerning stabilisation clauses, arguing that this is a quite unique feature of the petroleum sector, see Bowman (n 252). More on stabilisation clauses is available in Tabari (n 100) 143.

that, whilst not referring to or elaborating on any distinct features of *lex petrolea*, the arbitral tribunals in the aforementioned cases frequently refer to international customary law.[1047] Thus, it seems that today *lex petrolea*'s standing and value in dispute resolution is very weak.

In his updated study in 2018, Childs also added six new arbitral awards (two of which are commercial arbitration awards) that deal with nationalisation and determination of appropriate compensation,[1048] applicable law and breach of contract, including force majeure,[1049] and expropriation.[1050] Perhaps, after closer analysis by Childs of the facts and contents of these awards and respective criticism expressed by some authors of his 2011 study[1051] resulted in him modifying his firm position on the existence of *lex petrolea* by stating that the rulings in the referred arbitration awards have created, *or at least begun to create*, *lex petrolea*, but this *lex petrolea does not comprise a set of legal rules which displace host government contract or the applicable law.*[1052]

4.7. Conclusions

This chapter has focused on industry-specific dispute resolution within the branches of *lex mercatoria*. Notably, in each of these branches, except for *lex petrolea*, it has been possible to identify a leading dispute resolution authority which administers industry-related disputes. Moreover, these dispute resolution centres share some common features that distinguish them from traditional private conflict resolution providers. These features aid considerably the development of consistent and coherent law merchant.

Specifically, frequent reference to previously rendered decisions is a reality in the industry-specialised areas of dispute resolution referred to above. However, such practice does not constitute a precedent as known in litigation in common law jurisdictions, thus not being binding, but only persuasive.[1053] At the same time, the willingness of the industry-specific providers and users of their dispute-resolution services to have a reliable and consistent body

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[1047] See, for example, *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. The Government of the Libyan Arab Republic,* award dated 19 January 1979; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 30 March 1989; *Amoco International Finance v. the Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 14 July 1987; *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability dated 27 December 2010; *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Award dated 3 February 2006; *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 September 2009; *Chevron Corporation v Republic of Ecuador*, PCA Case No 2007-2, Partial Award on the Merits dated 30 March 2010.

[1048] *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award dated 9 October 2014 (partially annulled by Decision on Annulment dated 9 March 2017); *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Award dated 3 September 2013.

[1049] *Phillips Petroleum Co. Venezuela Ltd. v. Petroleos de Venezuela, S.A.,* ICC Case No.16848/JRF/CA, Final Award dated 17 September 2012; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 February 2017; *Mobil Cerro Negro, Ltd. v. Petroleos de Venezuela, S.A.,* ICC Case No. 15416/JRF/CA, Final Award dated 23 December 2011; *Gujarat State Petroleum Corporation Limited v. the Republic of Yemen and the Yemen Ministry of Oil and Minerals,* ICC Case No. 19299/MCP, Final Award dated 10 July 2015.

[1050] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 February 2017.

[1051] See generally Daintith (n 241).

[1052] Childs, 'The Current State of International Oil and Gas Arbitration' (n 239) 19.

[1053] Mourre (n 706) 57.

of law based on precedents is clearly visible.

The use of precedents is directly connected to the publication and accessibility of previously rendered decisions. All of the studied dispute resolution forums show very high rates of publication and accessibility to their decisions, apart from the LMAA, in connection with which it is compensated for by the activities of the SMA and its remarkable 100% rate of publication.[1054] This is a striking observation, especially if compared with the very low level of publication of dispute resolution outcomes as practiced by other arbitration institutions.[1055]

More importantly, the analysis of rendered published decisions has provided some intriguing insights. Firstly, a variety of sources are used in order to reach and justify a decision. Such sources range from international conventions to trade customs and usages, from national laws to legal principles, from court judgments to model contracts, etc. This supports the argument put forward in section 2.2.3 of Chapter 2 that nowadays state law and *lex mercatoria* (its branches in this context) do not compete, but successfully complement each other in order to result in efficient regulation.

Secondly, when deciding a case, panels under the aegis of industry-specialised dispute resolution not only interpret and apply relevant legal norms, but also develop and shape their own. The fact that industry-specific dispute resolution panels often have to deal with very technical issues which do not generally come to light in various regulatory regimes places them in a unique position to create new norms. As is shown above, the CAS has successfully been developing sports law principles and often refers to the concept of *lex sportiva* in its decisions. Panels under the UDRP are required to correctly construe general provisions of the policy and thus have been developing various principles and setting up standards for assessing the actions of parties in relation to the policy norms. The LMAA and the SMA often interpret contractual provisions through the prism of current maritime industry customs and usages, thus shaping and influencing any contractual practices. Thus, it is the dispute resolution process and norms elaborated during it which ensure the liveliness and further development of each of the branches of new *lex mercatoria*.

Notably, the decisions of each of the above discussed industry-specific dispute resolution providers are respected and accepted by states. According to the available data, any challenges to awards made by the CAS, the SMA and the LMAA are extremely rare, and judicial review of UDRP-based decisions is infrequent and, even if made, the courts tend to adhere to the findings of the relevant UDRP panel.

Lastly, doubts about the theoretical basis of *lex petrolea* that were expressed in section 2.3 of Chapter 2 are also confirmed through my analysis of its practical application. This chapter's

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[1054] In fact, the SMA rebuts another widely believed observation that almost no *ad hoc* awards (which constitute the majority of total arbitral awards rendered) are published. See Mourre (n 706) 63.
[1055] Mourre (n 706) 64.

arguments with regards to the absence of a specialised dispute resolution institution, lack of published commercial awards and scarcity of distinct matters in petroleum disputes which would involve elaboration and application of specific principles and customs relative to the oil and gas field present significant problems for the claimed existence of *lex petrolea*. It seems that in practice the concept's usage is tenuous and does not have any notable effect in dispute resolution. Even if it is assumed that *lex petrolea* does exist, it is unlikely to have any further effective development and consistent application in the absence of a specialised dispute resolution institution in the sector. It is also not beneficial to the proponents of the existence of *lex petrolea* that, due to the significant number of investment arbitration forums, arbitral awards from different institutions are likely to contradict each other, thus effectively preventing any harmonisation in the application of certain norms (here it would be appropriate to use the comparison of the LMAA and the SMA which not only seem to have similar approaches in the vast majority of cases, but also often refer to the awards rendered by each other). Moreover, a considerable portion of commercial arbitral awards in the petroleum industry is not published at all. Therefore, based on the above, the absence of a specialised dispute resolution platform which could ensure continuous and coherent elaboration, application and interpretation of petroleum principles and customs,[1056] *i.e.* has the features identified above in section 4.2, effectively makes *lex petrolea* a tenuous branch of *lex mercatoria* with very little room for further development. In fact, the frequent reference to international customary law rather than any distinct principles of the petroleum industry in reported arbitral awards makes one wonder as to whether there is any *lex petrolea* at the moment. In fact, these awards are representative of the application of *lex mercatoria* rather than its specific branch.

As has been accentuated in section 3.2 of Chapter 3 of this thesis, *lex documentaria commercium* satisfies most of the identified criteria to be recognised as a separate branch of *lex mercatoria* (see section 2.4 of Chapter 2): it has own unique industry-specific principles, customs and usages that are codified and promoted by a leading private industry association (the ICC), which enjoys support from states and the international community for its activities. In the next chapter I will explore *lex documentaria commercium*'s compliance with the last identified criteria, namely the availability of a leading industry-specific dispute resolution authority. This will be done through an analysis of DOCDEX, a proposed forum for dispute resolution within *lex documentaria commercium*. Such analysis will be made on the same basis as in relation to the key dispute resolution centres for each branch of *lex mercatoria* as identified in this chapter, *i.e.* publication and accessibility of the rendered decisions, active use of precedent, and development of unique industry-specific norms. The relevant analysis of DOCDEX will allow for better understanding of practical, and, consequently, theoretical limits of the application of *lex documentaria commercium*.

[1056] To some extent, this corresponds to the discussion in Saidov (n 140) 33-36.

CHAPTER 5. DISPUTE RESOLUTION WITHIN *LEX DOCUMENTARIA COMMERCIUM*: A CASE FOR DOCDEX

5.1. Introduction

In the previous chapter, I explored dispute resolution processes within the branches of *lex mercatoria* (namely *lex sportiva, lex maritima, lex informatica* and *lex petrolea*) for the purposes of the fulfilment of the last, albeit arguably the most important criteria, for the recognition of a branch of the modern law merchant: the presence of a leading industry-specific dispute resolution authority in the relevant area. It has been shown that in each of the branches analysed, except for *lex petrolea*, there is a leading dispute resolution authority which administers industry-related disputes. Moreover, I have identified certain common features that distinguish these sector-specialised dispute resolution centres from traditional private conflict resolution providers, such as placement of significant reliance on past precedents, consistent publication of dispute resolution outcomes (decisions) and their accessibility to the wider public. Notably, such features aid considerably the development of consistent and coherent law merchant. Furthermore, as has been demonstrated, industry-specialised dispute resolution centres not only interpret and apply relevant legal norms, but also develop and shape their own, thus setting up new industry standards and influencing contractual practices. On the basis of this I have argued that it is the dispute resolution process which ensures the liveliness and further development of each of the branches of the new *lex mercatoria*.

documentaria commercium, which has relevant features for the coherent and consistent development of this branch of *lex mercatoria*. This is of crucial importance, because if a case is to be made for the existence of a separate branch of *lex mercatoria* in the area of trade finance (see section 3.2 of Chapter 3), it is not sufficient for the author merely to provide for its theoretical justification and relevant principles, customs and usages. In line with the last criterion for the recognition of a branch of the modern law merchant (see section 2.4 of Chapter 2), there must be a dispute resolution authority which is responsible for the application, interpretation, consistency and further shaping of *lex documentaria commercium* and can efficiently respond to any changes in trade finance market practices. As per findings in Chapter 4, in order to achieve the above aims, a dispute resolution authority within a branch of *lex mercatoria* should routinely publish its outcomes, refer to past rendered decisions and develop unique norms through a dispute resolution process.

As discussed in section 3.2.2 of Chapter 3, the ICC has played an important role in the development of various instruments to regulate the trade finance field as well as any adjacent areas in the realm of international trade.[1057] Therefore, it is not surprising that the initiative to establish an industry-specific dispute resolution system was taken under the aegis of the ICC. Thus, in this chapter the analysis of the ICC-developed Documentary Instruments Dispute

[1057] Moreover, the concept of *lex mercatoria* has been revived and is actively promulgated by the ICC, see Fortier (n 449) 13 and Cuniberti (n 23) 424-434.

Resolution Expertise (DOCDEX) service and its activities will be made. The chapter begins with a description of DOCDEX, specifically discussing its nature, scope, benefits for trade finance actors and certain shortcomings. It then proceeds to a description of the unique procedural features of DOCDEX and an analysis of DOCDEX jurisprudence. In line with the previous chapter, emphasis is made on those features of industry-specialised dispute resolution which enable consistent and coherent development of a branch of *lex mercatoria*. Therefore, if DOCDEX is accepted as having such features, it will be an appropriate dispute resolution forum for ensuring the further development of *lex documentaria commercium*, thus signifying compliance with the last criterion for recognition of a branch of the modern law merchant.

5.2. Overview of DOCDEX

5.2.1. Establishment, nature and scope

DOCDEX was established by the ICC in October 1997 as a response to a growing number of disputes between commercial parties concerning documentary credits and the "apparent frustrations of bankers that many judges, arbitrators and lawyers failed to grasp the complexities of documentary credit practice".[1058] Indeed, there seems to be a recurrent issue of misinterpretation and incorrect application of the basic principles of documentary instruments' functioning, which may be counterintuitive to many lawyers and courts.[1059] Consequently, perniciously made court judgments have frequently been causing consternation among trade finance practitioners.[1060] Moreover, some trade finance actors have also failed to follow or interpret correctly the established principles and practices of documentary instruments' functioning, thus threatening the reliability of such instruments for international trade transactions.[1061]

Early from the time of its establishment DOCDEX has positioned itself as the unique platform for resolving trade finance-related matters, not on the basis of national law, but via interpretation of the express terms of a documentary instrument, soft law regulations, trade usages and customs, and the application of international standard trade finance practice. DOCDEX has seemingly built the above hierarchy of sources in its dispute resolution process in order to transcend national laws and any local customs.[1062]

Notably, shortly following the inception of DOCDEX, a prominent dispute resolution expert

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[1058] Manganaro (n 39) 289-290.

[1059] See, for example, Matthew Brown, 'Value-Adding Predictability: A Way Forward for Non-Legal Arbitrators & Letter of Credit Disputes' (2016) Transnational Dispute Management 9; Barnes, 'ISP98 Standby Forms' (n 527); Chang-Soon Song, 'Coming age of the DOCDEX Decisions' (2013) 19 (3) DCInsight; Lawrence Newman and Michael Burrows, *The Practice of International Litigation* (2nd edn, Juris 2013) V-143.

[1060] Gary Collyer, 'Documentary Credit Dispute Resolution under the DOCDEX Rules: Three Years On' (2000) ICC Publication No. 627 Special Supplement: Arbitration, Finance and Insurance; Anthony Connerty, 'Documentary Credits: a Dispute Resolution System from the ICC' (1999) 14 (3) Journal of International Banking Law 65, 67-68.

[1061] Collyer, 'Documentary Credit Dispute Resolution under the DOCDEX Rules: Three Years On' (n 1060); see also Gary Collyer and David Meynell (eds), *Collected DOCDEX Decisions 2013-2016* (ICC Publication No. 786E 2017) 2.

[1062] See the interview of Georges Affaki No. 1 (n 532).

commented that alternative dispute resolution was expanding into new fields and niches and adopting new forms with great future potential.[1063] Indeed, DOCDEX is of a hybrid nature as it has features of expert determination and arbitration and such a method for resolving disputes has been described by many as innovative.[1064] At an initial look, the system is closer to expert determination: the decision is made by experts, who are renowned individuals in the area of trade finance, the factual and technical circumstances play an important role in resolving a dispute, and the name of the system contains the word "expertise". Additionally, the DOCDEX Rules specifically provide that DOCDEX proceedings are not arbitral proceedings and a rendered decision is not an arbitral award.[1065]

However, there are some important differences between DOCDEX and standard expert determination. The parties to DOCDEX do not choose experts as opposed to general expert determination.[1066] Furthermore, they do not even know their identities. Consequently, DOCDEX experts escape any liability, which general experts cannot avail themselves of. In addition, whilst a partnership or a company can generally be appointed as an expert,[1067] this is not the case in DOCDEX. Like in arbitration, the decision-makers in DOCDEX are exclusively individuals.

Another difference is that before the decision by DOCDEX experts is reported to the parties, such decision is scrutinised by the ICC Banking Commission's Technical Adviser, who examines not only the form of such decision, but also can draw the experts' attention to any points of substance in order to ensure that it is in line with the ICC-developed instruments and/or international trade finance practice standards.[1068] It is worth noting that the same level of scrutiny is exercised by the ICC in its arbitration proceedings towards any arbitral awards.[1069] A further shift from expert determination can also be traced to the change in nomenclature following the latest revision of DOCDEX Rules. Thus, a party that refers to DOCDEX is called "Claimant" instead of "Initiator" and the application of such party is named "Claim" instead of "Request". However, the most substantial difference from both expert determination and arbitration is that every DOCDEX Decision is published and has a precedential value, thus capable of setting up certain standards in the area of trade finance. These aspects are discussed in detail below.

The evolution and expansion of DOCDEX scope is illustrative of its progress and adaptation to the needs of the business community. As mentioned above, initially DOCDEX was intended

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[1063] Nottage (n 703).

[1064] Chung (n 496) 1378; Anthony Connerty, 'DOCDEX: The ICC's Rules for Documentary Credit Dispute Resolution Expertise, part 2' (1998) 13 (11) Journal of International Banking and Financial Law 523, 529; William Park, 'Arbitration in Banking and Finance' (1998) 17 Annual Review Of Banking Law 213, 242; Connerty, 'Documentary credits' (n 1060) 71.

[1065] See Article 2(5) of the DOCDEX Rules.

[1066] Clive Freedman and James Farrell, *Kendall on Expert Determination* (5th edn, Sweet & Maxwell 2014) 1.

[1067] ibid 3.

[1068] See Article 9(2) of DOCDEX Rules.

[1069] See Article 34 of the ICC Arbitration Rules.

to resolve disputes only in relation to issues arising from the use of letters of credit governed by the ICC Uniform Customs and Practice for Documentary Credits (the UCP) and the ICC Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (the URR). However, following the revision of DOCDEX Rules in 2002 it became possible for the parties also to file disputes in relation to a collection incorporating the ICC Uniform Rules for Collections (the URC) and a demand guarantee incorporating the ICC Uniform Rules for Demand Guarantees (the URDG).

Following the latest revision to the DOCDEX Rules in 2015, the scope of application of DOCDEX has significantly been widened. It is claimed that now DOCDEX can address any trade finance-related dispute, including those relating to trade loans, syndications, negotiable instruments, risk purchase agreements, conflicts of priority and fraud in letters of credit, etc., *i.e.* all areas that are not otherwise covered by existing ICC banking rules.[1070] Such widened scope is likely to effectively transform the system into a universal platform for resolution of all trade finance and banking disputes. In particular, it means that DOCDEX, provided that it retains its industry-specialised features, could be used as a platform for a broader field of trade finance, not just in the area of documentary instruments.[1071] However, it remains to be seen how DOCDEX Panels will treat cases involving matters not currently regulated by any rules issued by the ICC, because at the time of writing there have not been any cases dealt under the revised DOCDEX Rules. Since the Trade Finance Channel of the ICC Digital Library has not been updated,[1072] it seems that such new DOCDEX Decisions will be available in the fifth volume of Collected DOCDEX Decisions, which should be released approximately in 2020-2021.

5.2.2. Benefits of DOCDEX

DOCDEX offers commercial parties some substantial benefits. An overview of the most significant of them is provided below. In addition, because a DOCDEX Decision is rendered by experts in the banking and trade sectors, the reasoning behind such a Decision is very different from the reasoning expressed in court judgments or arbitration awards in similar matters which tends to be overly generalized, because judges and arbitrators do not have enough expertise in the trade finance field.[1073] This itself can be considered a significant benefit for the parties.

[1070] 'ICC revises DOCDEX rules – enhancing scope, transparency, and efficiency' (*ICC*, 22 April 2015) <https://iccwbo.org/media-wall/news-speeches/icc-revises-docdex-rules-enhancing-scope-transparency-and-efficiency/> accessed 20 September 2019. However, there is some theoretical evidence that DOCDEX is not applicable to certain aspects of trade finance-related dispute, in particular to fraud in letters of credit, see Yanan Zhang, 'Approaches to Resolving the International Documentary Letters of Credit Fraud Issue' (PhD Thesis, University of Eastern Finland 2011), 209.

[1071] Which might be in line with the discussions instigated by Rosa Lastra with regard to the emerging *lex financiera* which covers international financial regulation generally, see Rosa Lastra, 'Do We Need a World Financial Organization?' (2014) 17(4) Journal of International Economic Law 787; Rosa Lastra, 'The Quest for International Financial Regulation' (2011), Inaugural Lecture, Charterhouse Square (23 March 2011) <https://www.qmul.ac.uk/law/media/law/docs/podcasts/lastra2011_transcript.pdf> accessed 20 September 2019; Thomas Cottier, John Jackson and Rosa Lastra, *International Law in Financial Regulation and Monetary Affairs* (OUP 2012) 423.

[1072] As of February 2019, when the ICC kindly granted me short-term access to their Digital Library.

[1073] Song, 'Sectoral Dispute Resolution in International Banking' (n 544) 545.

5.2.2.1. Low cost

The cost of applying to DOCDEX is considerably less in comparison to other dispute resolution options. The DOCDEX Rules provide for two types of fee which a claimant may be charged: the Standard Fee and the Additional Fee.[1074]

The Standard Fee depends on the amount in dispute. Thus, if the amount in dispute is equal to or below USD 1,000,000, the claimant is required to pay USD 5,000. If the amount in dispute exceeds USD 1,000,000, the Standard Fee is USD 10,000.[1075] In certain circumstances and taking into account the facts and documents underlying the dispute, the Additional Fee may be charged, which does not exceed 50% of the Standard Fee.[1076] Given that an average amount in dispute in DOCDEX is USD 4.2 million,[1077] such policy is very beneficial for trade finance actors, in particular when compared to general arbitration institutions which, as a rule, charge their fees on the basis of the amount in dispute.[1078] However, there is a certain downside: pursuant to DOCDEX Rules, the fee is paid by the claimant only.[1079] Therefore, no allocation of fees is available, unlike in arbitration.[1080]

5.2.2.2. Speed

A DOCDEX Decision is made within 30 days of receipt of all information and documents, which a DOCDEX Panel considers necessary for determining the issues in a dispute.[1081] This time limit is extended only in exceptional circumstances, which should be approved by the ICC.[1082]

Such speed is achieved, *inter alia*, through the use of electronic submissions[1083] and the absence of oral hearings.[1084] Often the experts do not need to physically meet and be in one premises in order to resolve a dispute and can handle it via means of video- and telecommunication.[1085]

The ICC estimates that the entire process from filing a claim to communication of a decision to the parties usually takes between two and three months.[1086] Again, the comparison with arbitration is quite dramatic: the average duration of arbitral proceedings varies between 14 to

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[1074] See Article 10 of the DOCDEX Rules.
[1075] See Article 1 of the Appendix to the DOCDEX Rules.
[1076] See Article 2 of the Appendix to the DOCDEX Rules.
[1077] Song, 'Sectoral Dispute Resolution in International Banking' (n 544), 534.
[1078] According to the official data, the average cost of arbitration at the Singapore International Arbitration Centre (the SIAC) amounts to USD 80,337, in the Hong Kong International Arbitration Centre (the HKIAC) – USD 117,045, in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) – USD 181,864, and in the London Court of International Arbitration (the LCIA) – around USD 200,000.
[1079] Article 3(3) of the DOCDEX Rules.
[1080] See, for example, the LCIA Rules (Art. 28), the China International Economic and Trade Arbitration Commission Arbitration Rules (Art. 52), the SIAC Rules (Art. 37), the HKIAC Rules (Article 33), etc.
[1081] Article 8(5) of the DOCDEX Rules.
[1082] Article 8(6) of the DOCDEX Rules.
[1083] See Articles 3(1), 4(2), 5(2) and 6(1) of the DOCDEX Rules.
[1084] Articles 2(4) and 8(7) of the DOCDEX Rules.
[1085] As an example, see Anthony Connerty's experience of being an expert at a DOCDEX Panel described in his article 'Trade with China: How and Where Disputes Can Be Resolved' (1998) 64 (2) Arbitration 129 at footnote 22.
[1086] Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2009-2012* (ICC Publication No. 739E 2012) 3; see also 'DOCDEX' (*ICC*, [no date]) < https://iccwbo.org/dispute-resolution-services/docdex/ > accessed 20 September 2019.

16 months.[1087]

5.2.2.3. Procedural ease

As mentioned above, DOCDEX is a documentary-based process which does not involve any oral hearings.[1088] Furthermore, the parties are not allowed to submit any supplementary documents in addition to those included in the original claim and/or answer, except for those which are specifically requested by a DOCDEX Panel.[1089]

Moreover, the absence of oral hearings results in a non-adversarial basis of the process. This helps to maintain business relations following the resolution of a dispute, which may not always be the case in litigation and arbitration.

In practice, for the users of the system (mostly companies and banks) this means that usually there is no need to seek professional legal advice from an external advisor because the matter can effectively be handled by an in-house legal department. This is particularly beneficial for small and medium enterprises, who often find themselves at a disadvantage when their opponent with greater resources (a large corporation, a multinational company or an international bank) hires a team of renowned counsel for arbitration or attorneys for litigation.

Also, unlike in arbitration, there is no need to specify DOCDEX dispute resolution in any clause of contractual documentation or conclude a separate agreement. DOCDEX is available upon direct reference to the ICC by the claimant. Additionally, proceedings in a DOCDEX case carry on and a Decision is made even in the event of the absence of any answer and submission by the respondent.[1090]

5.2.3. Limitations of DOCDEX

Despite its many benefits, DOCDEX is not an ideal system and there are some limitations inherent in the process. These are listed below.

5.2.3.1. Limited scope

Naturally, DOCDEX has limited scope and applies only to disputes in the areas of banking and trade finance. Thus, its application is not universal. Moreover, due to its specific documentary-based procedure, DOCDEX is not appropriate where the hearing of witnesses, oral examination or oral submissions are required to resolve any factual or legal issues.[1091]

[1087] According to data taken from the official websites of the respective arbitral institutions, the average duration of arbitration proceedings in the SIAC is 13.8 months, in the HKIAC is 14.63 months, and in the LCIA is 16 months.

[1088] Articles 2(4) and 8(7) of the DOCDEX Rules.

[1089] Article 5(3). However, it is worth noting that a dangerous precedent was set in DOCDEX Decision No. 342. The proceedings in this Decision were initiated by the respondent in DOCDEX Decision No. 336, who failed to submit an answer in a timely manner. The Panel allowed such submission stating that it provided "for the arguments of the Initiator to be taken into account and to reconsider the conclusion of DOCDEX Decision No. 336" (see Collyer and Meynell, *Collected DOCDEX Decisions 2013-2016* (n 1061) 97). Even though the Panel did not amend DOCDEX Decision No. 336 following consideration of new arguments, this practice of opening new proceedings due to the failure of one of the respondents to submit a timely answer is not provided by and clearly goes against the spirit of the DOCDEX Rules.

[1090] Article 4(5) of the DOCDEX Rules

[1091] Article 2(4) of the DOCDEX Rules.

In addition, Article 2(3) of the DOCDEX Rules poses significant threats to the existing scope of the system. Thus, pursuant to this provision, if the dispute arises out of or is in connection with an instrument, undertaking or agreement that does not provide for the application of any ICC Banking Rules, it shall be administered under the DOCDEX Rules *only* if each claimant and each respondent so agree. Consequently, because a respondent is not obliged to submit an answer to a claim, in practice it is likely that DOCDEX will be used almost exclusively for resolving disputes which involve some of the ICC banking rules. Whilst there are strong claims that the UCP is incorporated in most or nearly all commercial letters of credit and is used by the banks and banking associations of virtually every country and territory in the world,[1092] this does not mean that other types of documentary instruments incorporate the ICC-developed soft law banking rules on the same scale.[1093]

Furthermore, given the nature of the system, DOCDEX Panels have consistently noted that the system cannot deal with issues under the regulation by any national law,[1094] decide which national law should apply,[1095] change or uplift court orders, etc.[1096] Moreover, DOCDEX is not applicable in matters which are subject to regulation not only to the ICC-issued soft law, but to the applicable law. For example, in DOCDEX Decision No. 316 the Panel stated that it had no authority to decide in the matter whether the absence of a document not listed under the terms of the letter of credit, but mandatorily required by the law of the importing country in order to perform custom clearance of goods, comprises a valid ground to not effect the payment.

At the same time, DOCDEX Panels often disregard references to any previous court judgments cited in support of a party's position, stating that since DOCDEX Rules strictly provide for dispute resolution on the basis of the ICC soft law rules only, the Experts do not take into consideration any reference to litigation processes.[1097] However, if there is an ongoing litigation process or recently issued judgment in a dispute between the parties to DOCDEX, the Panels abstain from commenting on it. For example, in DOCDEX Decisions No. 303 and 308 the Panel stated that it did not have the authority to discuss any issued or pending judgment in litigation between the parties, because doing otherwise would violate the principle of independence of a court's evaluation. Instead, the Experts in these cases limited themselves to determination of specific aspects of documentary instruments practice.

In addition, in DOCDEX Decision No. 280 the Panel stated that it was not empowered to decide as to whether the previously issued ICC Banking Commission Opinion was well-founded or

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[1092] Walter Baker and John Dolan, *Users' Handbook for Documentary Credits under UCP 600* (ICC Publication No. 694 2008) 10; Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees* (Federation Press 2003) 48.
[1093] See examples in Mugasha (n 1092) 48-55.
[1094] See DOCDEX Decisions No. 229, 314, 327, 333, 338, etc.
[1095] See DOCDEX Decision No. 315.
[1096] See DOCDEX Decisions No. 236, 317 and 343.
[1097] See DOCDEX Decisions No. 221, 268, 299, 347. Although see reference by the Panel in DOCDEX Decision No. 232 to the principles of letters of credit discussed in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1AC 168.

not.

5.2.3.2. A non-binding outcome

A contentious issue is that, unless the parties agree otherwise prior to the commencement of the proceedings, a DOCDEX Decision is not binding on them.[1098] Such an approach, taken by the drafters of DOCDEX Rules, has received some criticism and has resulted in debate as to whether the DOCDEX Decision should be binding on the parties irrespective of their choice or agreement.[1099]

It is likely that the approach of the ICC towards DOCDEX Decisions being non-binding, which was taken in 1997, represents an initial compromise in order to attract more users to the system at the very early stage of its development.[1100] However, since DOCDEX has been positively received by commercial actors and banks, this approach might be changed in the next revision of DOCDEX Rules. In particular, this would result in the mandatory nature and the duty of a respondent to participate in the proceedings and, consequently, would resolve the problem that arises from Article 2(3) of the DOCDEX Rules described above.[1101] Another possible and currently discussed development would be inclusion of a specific provision for a mandatory dispute resolution through DOCDEX[1102] in the various ICC banking rules akin to the one in the Olympic Charter[1103] and WADA Code[1104] for the CAS, or ICANN's Registration agreement for the UDRP.[1105] A less likely and practically more demanding option would be the development by the ICC of standard forms for various types of documentary instruments with a specification of DOCDEX as the dispute resolution forum (the analogous approach to BIMCO's standard form contracts and specification of the LMAA therein). In fact, a 'DOCDEX clause' is now becoming more common in international trade practice, under which all disputes arising out of or in connection with a documentary instrument shall be finally settled under the DOCDEX Decision in accordance with the ICC DOCDEX Rules, giving DOCDEX the exclusive jurisdiction to hear such disputes.[1106]

5.2.3.3. Cannot resolve damages

DOCDEX Panels can decide whether the obligation to pay under a particular documentary instrument was breached or wrongfully refused, thus declaring a losing party liable to pay the amounts under the respective documentary instrument.[1107] However, as a general rule, DOCDEX is not suitable for determination of the quantum of damages, compensation, interest

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[1098] Article 2(6) of the DOCDEX Rules.
[1099] Song, 'Sectoral Dispute Resolution in International Banking' (n 544) 545; Manganaro (n 39) 290.
[1100] Song, 'Sectoral Dispute Resolution in International Banking' (n 544) 533.
[1101] ibid 550.
[1102] Song, 'Coming age of the DOCDEX Decisions' (n 1059).
[1103] See Article 61 of the Olympic Charter.
[1104] See numerous references to the CAS in the WADA Code, in particular Articles 8.5 and 13.
[1105] See note 2 to and Article 1 of the UDRP.
[1106] See Song, 'Coming age of the DOCDEX Decisions' (n 1059); Sindberg, 'LC Disputes – Is DOCDEX the Answer?' (n 545). However, see doubts over the binding effect of such clause expressed by Brown (n 1059) 19.
[1107] See DOCDEX Decisions No. 239, 243, 302, 309, 321, 327 and 350.

or any other additional expenses (such as legal fees, DOCDEX fee, etc.) payable to a winning party.[1108] At the same time, it is worth noting that in cases dealing with documentary collections the position seems to be different and there have been several instances of Panels determining the losing party liable to pay the collection value as well as any interest and other costs.[1109]

5.2.3.4. Unknown identity of decision makers

A DOCDEX panel consists of three impartial experts with extensive experience in and knowledge of trade finance transactions, who are selected from a special list maintained by the ICC Banking Commission.[1110] Notably, unlike in arbitration, the parties do not choose the experts and the identities of the experts are not disclosed to them. Thus, even though before acceptance of any appointment, a prospective expert must sign a statement of acceptance, availability, impartiality and independence and must disclose in writing any such facts or circumstances,[1111] the parties are precluded from challenging the appointment of such experts. Whilst this approach serves as a certain safeguard for the ICC and DOCDEX experts against any liability, some commentators noted that it can constitute a violation of the procedural due process principle.[1112]

Summarising the above, it is clear that DOCDEX has some benefits and limitations. The ICC should be especially mindful of rectifying the latter in order to make the service more attractive for trade finance actors. Nevertheless, following the 2015 revision of DOCDEX Rules it is likely that the system will be further developed and receive universal recognition as the prime platform for resolving of all trade finance disputes, thus not being limited to documentary instruments only. However, this is likely to be a topic of future research (see section 6.2 of Chapter 6). In the context of the research question of this study, this thesis aims to make a case for the existence of a new branch of *lex mercatoria*, namely *lex documentaria commercium*. Thus, the following sections examine DOCDEX as the primary forum for dispute resolution within *lex documentaria commercium* (see the last criterion outlined in section 2.4 of Chapter 2) and explore whether DOCDEX has the necessary features that facilitate the further development this branch of the new *lex mercatoria* in a coherent and consistent manner.

5.3. Dispute resolution within *lex documentaria commercium*

5.3.1. The leading dispute resolution authority

The ICC is a natural institution to develop a specialised dispute resolution forum, given the amount of soft law trade finance regulations developed under its auspices (see the discussion in section 3.2.2 of Chapter 3).[1113] In fact, as mentioned above, until 2015 DOCDEX was limited

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[1108] See DOCDEX Decisions No. 257, 317 and 345.
[1109] See DOCDEX Decisions No. 283, 333, 339 and 345.
[1110] Article 7(1) of the DOCDEX Rules.
[1111] Article 7(7) of the DOCDEX Rules.
[1112] Brown (n 1059) 20.
[1113] See also Collyer and Katz, *Collected DOCDEX Decisions 2009-2012* (n 1086) 3.

exclusively to disputes arising out of the instruments subject to the ICC banking rules. Obviously, this ensured that the interpretation and application of soft law instruments developed by the ICC is done in the way intended by the ICC when such instruments were designed.

Interestingly, DOCDEX is not the only specialised dispute resolution forum available in trade finance matters. The International Center for Letter of Credit Arbitration (ICLOCA)[1114] was established by the Institute of International Banking Law & Practice in 1996, *i.e.* even before the inception of DOCDEX. Its arbitration service is available in relation to a letter of credit, independent guarantee, collection instruction, reimbursement undertaking, or other agreement or undertaking, whether independent or not.[1115] The key difference between DOCDEX and ICLOCA is that the latter functions as a pure arbitration service and its rules are adopted on the basis of the UNCITRAL Arbitration Rules. Thus, parties submitting disputes to ICLOCA will receive a final and binding arbitration award enforceable under the New York Convention. However, in nearly two decades since its establishment there has not been a single award rendered by ICLOCA.[1116]

The attempt to revive the idea of a specific arbitration service for trade finance was made in 2012 through the establishment of the Panel of Recognized International Market Experts In Finance foundation (P.R.I.M.E.).[1117] P.R.I.M.E. was established with the aim of facilitating dispute settlement, reducing legal uncertainty and fostering stability in the global financial markets, and consists of internationally renowned experts in the field of both finance as well as dispute resolution, including retired and sitting judges, central bankers, regulators, representatives from private practice and derivatives market participants.[1118] Thus, P.R.I.M.E. is concerned not only with documentary instruments, but a larger area of financial markets regulation.

P.R.I.M.E. released its arbitration rules, as well as mediation rules, in 2012, which were revised in 2016. P.R.I.M.E. arbitration rules, like ICLOCA arbitration rules, are based on the UNCITRAL Arbitration Rules. However, despite some positive general developments such as recognition by the International Swaps and Derivatives Association (ISDA) as one of the potential dispute resolution forums in derivatives disputes, extensive cooperation with the PCA and plans to co-operate with LexisNexis on the creation of a specific financial case law database,[1119] to the

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[1114] 'International Center for Letter of Credit Arbitration' (*Institute of International Banking Law & Practice*, [no date]) <http://iiblp.org/about-us/international-center-for-letter-of-credit-arbitration/ > 20 November 2018.

[1115] See Article 1 of the ICLOCA Rules.

[1116] Zhang (n 1070) 175; Brown (n 1059). Also confirmed by Professor Georges Affaki during his lecture 'Arbitration in Banking and Finance Deconstructed: The New Deal' at the Chartered Institute of Arbitrators on 5 April 2018.

[1117] 'History' (*P.R.I.M.E. Finance*, [no date]) <https://primefinancedisputes.org/page/history > accessed 20 September 2019.

[1118] Daniella Strik, 'Launch of P.R.I.M.E. Finance Arbitration Rules: dispute resolution in global financial markets' (*Kluwer Arbitration Blog*, 17 January 2012) <http://arbitrationblog.kluwerarbitration.com/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets/ > accessed 20 September 2019.

[1119] 'Press releases' (*P.R.I.M.E. Finance*, [no date]) < https://primefinancedisputes.org/page/press-releases > accessed 20 September 2019.

author's best knowledge, to date there have not been any reports about opened or concluded arbitration proceedings.[1120]

Thus, neither ICLOCA nor P.R.I.M.E. have proven to be a successfully functioning system in the area of trade finance. This could be attributed to a plethora of reasons, such as an inherent preference towards litigation rather than arbitration by banks, insufficient procedural benefits or even the fact of disputes being inevitably resolved through reference to a national law.[1121] In any event, DOCDEX dispute resolution, despite some of its procedural shortcomings, has had by far a more successful record of handled disputes.

Moreover, both ICLOCA Arbitration Rules and P.R.I.M.E. Arbitration Rules do not provide for mandatory publication of the rendered awards and require the agreement of both parties in order to publish an anonymized extract from the award.[1122] In particular, this means that the achievement of consistency and predictability, and thus the contribution to *lex documentaria commercium* through following previously rendered decisions and gradual build-up of new case law, is not likely to occur in these dispute resolution centres, even if they begin to adjudicate disputes. In fact, by taking such an approach towards publication of the rendered awards ICLOCA and P.R.I.M.E. do not differ from general arbitration institutions offering dispute resolution services for resolving trade finance matters.

5.3.2. Publication of rendered decisions

Confidentiality is valued within DOCDEX, so no names and/or origin of the participants in the process (parties and experts) are publicly disclosed .[1123] At the same time, every DOCDEX Decision is numbered and published as desribed.[1124] Publication is made in the Trade Finance Channel of the ICC Digital Library and the ICC also periodically publishes them in a special collected DOCDEX Decisions publication.[1125]

Unfortunately, both of these sources are not freely accessible. Subscription to the Trade Finance Channel of the ICC Digital Library is an expensive option for accessing the DOCDEX database, because it gives access not only to DOCDEX Decisions, but also to many other sources of trade finance regulation, such as ICC Opinions, letters of credit legal cases summaries, specialised ICC banking and trade finance magazine, etc. At the time of writing the standard one-year subscription package costs EUR 3125.00.[1126]

[1120] In addition, relevant email inquiries were sent to P.R.I.M.E. in December 2018 and February 2019. However, no response has been received at the time of writing.

[1121] Interestingly, when discussing the improvement to the existing P.R.I.M.E. arbitration rules, Matthew Brown suggested that the default substantive rules applicable to dispute resolution should be "letter of credit practice and the law merchant", see Brown (n 1059) 25.

[1122] See Article 32(8) of the ICLOCA Arbitration Rules and Article 35(5) of the P.R.I.M.E. Arbitration Rules.

[1123] Article 12(1)-(3) of the DOCDEX Rules.

[1124] Article 12(1) of the DOCDEX Rules. This is similar to the dispute resolution under the UDRP Policy.

[1125] 'DOCDEX' (n 1086).

[1126] 'ICC Digital Library Subscription' (*ICC*, [no date]) < https://library.iccwbo.org/subscription.htm > accessed 20 September 2019.

A cheaper solution is to purchase a special collected DOCDEX Decisions publication, which is currently available in four volumes selling separately.[1127] The price differs for each volume, but if one wishes to buy all four it is EUR 273.5 at the time of writing. Given that there are 137 published decisions (excluding the withdrawn decisions), the price for each DOCDEX Decision stands at approximately only EUR 2.00. Thus, even though they are not freely distributed, DOCDEX decisions are affordable to most, if not all, businesses and trade finance practitioners.

The problem is, however, that such collected DOCDEX Decisions publications are published with a significant lag of approximately four years. Thus, a party might not be aware about the most recent DOCDEX decisions, which could potentially be of great significance to its dispute. It would be logical and welcomed for a Decision arising from any new DOCDEX cases to appear immediately in the Trade Finance Channel of the ICC's Digital Library. However, upon accessing it during July-August 2018 and again in February 2019 I did not find any new DOCDEX Decisions issued after 2016, the year when the latest publication of the collected DOCDEX Decisions was released.

As has been stressed in relation to the CAS and dispute resolution within *lex sportiva* (see section 4.3.3 of Chapter 4), it is not sufficient for the dispute resolution outcomes to be merely published, they need to be promptly published soon after rendering. Failure to do so may result in a lack of coherence in the decision-making process and attract criticism of the transparency of the dispute resolution system and its activities.

5.3.3. Use of precedent in dispute resolution

DOCDEX Rules do not provide for the use of precedents. However, similarly to other industry-specialised dispute resolution providers discussed in Chapter 4, due to the publication of DOCDEX decisions the parties and panels have started to cite previous DOCDEX decisions. After such development was spotted by the ICC, it seems that, whilst not specifically addressing the matter, the organisation actually encourages this practice.[1128]

The first such reference appeared in DOCDEX Decision No. 250 in 2004.[1129] The issue in this case was the refusal of documents under the letter of credit by the issuing bank due to several discrepancies, one of them being presentation of four copies of invoices instead of six as required by the letter of credit. However, two additional copies were submitted to the presenting bank afterwards (outside of the presenting period). In analysing whether this discrepancy was justified to constitute a refusal under the UCP the DOCDEX Panel referred to DOCDEX

[1127] 'ICC Store' (ICC, [no date]) http://store.iccwbo.org/search?Q=collected+docdex > accessed 20 September 2019.

[1128] "The revised rules will also enhance transparency – requiring ICC to publish redacted decisions in every DOCDEX case. *Doing so will not only set a precedent for future cases*, it will also allow ICC to analyze the panel of experts charged with forming a decision [...]", see 'ICC revises DOCDEX rules' (n 1070). In fact, this is very similar to the developments in other industry-specialised dispute resolution centres discussed in Chapter 4, see the CAS, the UDRP Panels, the SMA and the LMAA.

[1129] Given that DOCDEX Decisions start with No. 201, this is a prompt adaptation of the practice of precedents.

Decision No. 235, in which a similar issue was discussed, namely the presentation of fewer copies of certificate of origin than was required by the respective letter of credit. Thus, drawing the analogy with the approach taken in DOCDEX Decision No. 235 that presentation of insufficient number of copies than specified in the letter of credit constituted a valid discrepancy within the framework of the UCP, the DOCDEX Panel ruled that the fact of presenting additional required copies following the expiration of the presenting period did not remedy the incorrect presentation.

The reference to a previous DOCDEX Decision was also employed by the panel in DOCDEX Decision No. 255, which concerned a dispute between two banks over the refusal to reimburse under two letters of credit due to a number of discrepancies. The DOCDEX Panel analysed the validity of each discrepancy as identified by the respondent (the issuing bank). One of the discrepancies stated by the issuing bank was the fact that since the amount of shipped goods exceeded the one specified in the letter of credit, the payment under the letter of credit was overdrawn. However, the terms of the issued letter of credit allowed a tolerance of "+/- 5%" on shipment quantity of 5000 metric tons. Since the shipped amount was 5055.849 metric tons, *i.e.* within the tolerance allowed by the terms of the letter of credit, the DOCDEX Panel reiterated the position expressed in DOCDEX Decision No. 243: as long as the quantity of shipped goods is within the limits set by the terms of a letter of credit, the amount drawn under such a letter of credit can be adjusted upward or downward without its amendment, provided that the unit price complies with its terms. In this case the price per unit was in accordance with the conditions of the relevant letter of credit. Thus, the discrepancy was declared as invalid.

The first instance of a party citing previous DOCDEX Decisions in its submissions can be traced to DOCDEX Decision No. 257. The beneficiary under a letter of credit initiated a lengthy submission with regards to 20 claims, one of which concerned the meaning of the wording "in trust". In support of this claim the beneficiary relied on "passed DOCDEX decisions and leading court cases of letter of credits" *[sic].* However, the initiator did not specify any previous DOCDEX decisions (or court cases), resulting in only a general statement.

Thus, the first specific reliance on previous DOCDEX Decision by a party is found in DOCDEX Decision No. 263. Interestingly, both parties to the case mentioned DOCDEX Decision No. 232 in support of their opposing arguments. However, the DOCDEX Panel took a view that DOCDEX Decision No. 232 could not be used in support of either of the positions because the facts of that case substantially differed from the factual background of the situation in question.[1130]

[1130] See para 6 of DOCDEX Decision No. 263: "One of the issues that Decision relates to is whether or not an understandable discrepancy raised by the issuing bank is still valid if the latter answers the nominated bank's of clarification later than the seventh banking day after it received documents (see point 16 of Analysis and decision section of Decision 232). This is not the case at hand, because the Initiator never requested clarification of the Respondent".

The factual difference of the cases cited by the parties may indeed be the reason why DOCDEX panels disregard such supporting evidence,[1131] which is indicative of such panels taking a careful examination of cases that may have a precedential value for resolving the issue before the experts in order to build sound and coherent case law. Thus, the active use of and reliance on the positions set in previous DOCDEX Decisions[1132] combined with such careful scrutiny has resulted in DOCDEX Panels being very mindful not only of their conclusions with regards to the presented disputed issue, but also about any relevant consequences for future interpretation and practice in cases dealing with similar matters.

For example, in DOCDEX Decision No. 290 the panel was faced with the following issue. Under the issued irrevocable letter of credit the goods were to be dispatched from Busan (Korea) to Qingdao (China). However, some documents required by the letter of credit (the commercial invoice, the packing list and the certificate of quality) showed a reversal of the order of the shipment route: the port of loading was shown as Qingdao, and the port of destination as Busan. At the same time, the bill of lading was correctly filled in and showed the shipment route in accordance with the requirements of the letter of credit. Thus, the initiator claimed that there had been a typographical error because the transport document was filled correctly, and in the commercial invoice the incoterm was also shown correctly, *i.e.* CIF Qingdao. Therefore, according to the initiator, the typographical error had no consequential impact on the overall content of the documents and the respondent was not entitled to refuse the presentation of the documents. The respondent was of the opinion that there was not merely a typographical error or misspelling, but a material discrepancy.

In deciding this issue the DOCDEX Panel consulted a variety of sources, starting with the UCP article 14(d) dealing with the standard for examination of documents, to article 25 of the ISBP dealing with misspellings or typing errors as well as general banking practices relevant to the matter. Thus, the Panel concluded that since the port of loading and port of final destination are totally different ports and places that actually exist, it could not be argued that it was due to a misspelling or typographical error. In fact, it could only be argued that the "typing error" consisted of typing the correct word in a wrong place. Whether it was because of lack of concentration, negligence or poor professionalism did not matter because according to the general banking practice the document examiners are only responsible for examining the conformity of documents with the terms of a letter of credit on their face. Otherwise the interpretation might become speculative and "could open a can of worms beyond what we might be prepared to concede in this case and beyond the spirit and letter of paragraph 25 of the ISBP (2007 Revision)".[1133] This, the panel continued, would stretch the scope of paragraph

[1131] See, for example, DOCDEX Decision No. 330.

[1132] In addition to the cases cited above, see also other cases wherein a party or a panel referred to previous DOCDEX Decisions, *e.g.* DOCDEX Decisions No. 345 and 347. Also, DOCDEX Decision No. 344 is identical to DOCDEX Decision No. 343.

[1133] See DOCDEX Decision No. 290 as reported in Collyer and Katz, *Collected DOCDEX Decisions 2009-2012* (n 1086) 44-45.

25 of the ISBP to cover a situation which may not have been intended and "could create a precedent, which may prove to have far-reaching and, possibly, undesirable consequences and ramifications"[1134]. Thus, the Panel found in favour of the respondent and recognised the issue in the case to be a discrepancy rather than a misspelling or a typing error.

Furthermore, in DOCDEX Decision No. 348 the panel specifically emphasised the importance of consistency of DOCDEX decisions, stating that the rendered decision in this case was consistent with previous DOCDEX decisions dealing with handling documents under a documentary collection.[1135]

5.3.4. Reliance on existing and development of new industry-specific principles, customs, usages and practices through dispute resolution

The main task of a DOCDEX Panel is appropriately to interpret and apply the provisions of the uniform rules in the area of trade finance developed and issued by the ICC. This includes such instruments as the UCP, the URDG, the URR and the URC. In addition, article 2(2) of the DOCDEX Rules provides that panels in a DOCDEX dispute may also refer to international standard practice in trade finance. This is best represented by, but not limited to, the International Standard Banking Practice (ISBP 745) and various ICC Opinions on certain aspects of trade finance. In fact, a DOCDEX Decision itself can be considered as international standard trade finance practice or at least being capable of creating such practice[1136] (see also the discussion in sections 3.2.3.2.6-3.2.3.2.8 of Chapter 3).

Since the instruments described above are themselves considered as representative examples of industry-specific customs and practices, DOCDEX panels have mostly been focusing on ensuring their correct understanding and coherent and consistent practical application. Thus, upon my analysis of DOCDEX Decisions rendered to date, I have identified three dominant functions which DOCDEX Panels exercise when dealing with an issue before them: a) interpreting relevant ICC rules; b) applying trade finance principles; and c) developing new practices and standards.

5.3.4.1. Interpretation of relevant ICC rules

The largest portion of DOCDEX Panels' activities is to correctly interpret the ICC-issued rules in the area of trade finance and provide important guidance for all concerned parties.[1137] For example, in DOCDEX Decision No. 299 the beneficiary company (the initiator) claimed that the confirming bank (the respondent) failed to negotiate and pay the required amount under the letter of credit. The confirming bank argued that following the receipt of the instruction from

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[1134] ibid 45.

[1135] See DOCDEX Decision No. 348 as reported in Collyer and Meynell (n 1061) 128.

[1136] Gary Collyer, 'Exclusions, Interpretations and the Future of the UCP' (2008) 14(2) DCInsight; the interview of Gary Collyer (n 572); Pavel Andrle expressed this opinion in his interview, see 'Two Observers with Questions About the New UCP' (2007) 13 (3) DCInsight.

[1137] King-Tak Fung, 'Another Look at Five Banking Days and Negotiation' (2010) 16 (1) DCInsight.

the initiator to send the documents to the advising bank "as presented" it was obliged to honour or negotiate only against the compliant presentation, which was not the case here because the advising bank had identified a number of discrepancies.

In order to determine the amount of a confirming bank's obligations the DOCDEX Panel proceeded to analyse the meanings of the terms "Complying presentation" and "Confirmation" as specified in article 2 of the UCP. It stated that it was clear from the wording used in these definitions that the confirming bank was not obliged to negotiate or pay against the presentation of discrepant documents. Furthermore, the DOCDEX Panel, relying on international standard banking practice, stated that by giving specific instruction in writing to accept the documents and forward them to the issuing bank as presented the initiator effectively discharged the respondent from its duties as a confirming bank pursuant to article 14(a) of the UCP. Therefore, the DOCDEX Decision was rendered in favour of the respondent.

The initiator decided to take this matter to court, but suffered another defeat in the Superior Court of Québec. Not least, this was attributed to DOCDEX Decision No. 299 which was presented by the respondent. Following an analysis of the DOCDEX Decision and the overall nature of DOCDEX proceedings, the Honourable Chantal Masse stated that whilst the court was not bound by the DOCDEX Decision in any way and treated it as a judicial fact, the tribunal was " in complete agreement with its [the DOCDEX Panel's] interpretation of the UCP 600 rules".[1138]

In DOCDEX Decision No. 301 the Experts decided whether the refusal of a claim under the guarantee was made in accordance with the URDG. The Panel analysed Article 10 of the URDG 458 (applicable to the guarantee), which provided that a guarantor should have a reasonable time within which to examine a demand under a guarantee and to decide whether to pay or to refuse the demand. Thus, the Panel discussed two issues: a) what was reasonable time for the examination and sending of the notice; and b) was the content of the sent notice of refusal in accordance with the requirements of the URDG 458. With regards to the former issue, the Panel referred to the ICC Banking Commission Opinion R624 (2004), which concluded that the reasonable time for processing a demand guarantee should be three banking days. Since the URDG 458 did not specify any particular requirements towards the content of the notice of refusal, the mere fact of stating that presentation was not complete (without specification of the missing documents) was sufficient for the notice to satisfy the requirement of the URDG.

In DOCDEX Decision No. 257 the Panel dismissed one of the claims completely on the basis that Article 14(c) of the UCP 500 was not applicable to nominated or advising banks, but only to issuing banks.

[1138] *Teston Precision Products Inc. v. Bank of Nova Scotia* [2012] QCCS 4185, 19-20.

It is worth mentioning that DOCDEX Panels can also provide for interpretation of DOCDEX Rules. Such interpretation was mostly required by parties in the early years following the inception of the system in order to clarify certain aspects. For example, in the very first decision rendered (DOCDEX Decision No. 201) the respondent claimed that standby letters of credit were out of the scope of the system. However, through the interpretation of Articles 1 and 2 of the UCP 500 as well as some ICC Opinions, the Panel decided otherwise. Similarly, the Panels have continuously invoked the position that DOCDEX is not suitable for determination of the quantum of damages as this is outside of DOCDEX Rules and, consequently, the Experts do not have the required authority.[1139]

5.3.4.2. Application of trade finance principles

DOCDEX Panels often decide disputes on the basis of trade finance principles.[1140] For example, DOCDEX Decision No. 277 dealt with the refusal of the issuing bank to honour presentation. In this case, the terms of the letter of credit provided that "payment will be effected against documents with no discrepancies and the arrival advising report from shipping company which expiry date is as same as that of this L/C". The beneficiary presented the documents including a document named "arrival advising report" from a shipping company. However, the issuing bank refused to honour the presentation claiming that the supplied "arrival advising report" was not the document required by the credit as it could only be issued after arrival of the vessel.

The DOCDEX Panel resolved the matter by applying the principle of specificity and unambiguity of the terms of credit, which, as it stated, is enshrined in international standard banking practice, the ISBP and is also supported by several ICC Opinions.[1141] According to this principle, any ambiguity in the terms of the credit must be held against the issuer of the credit. Therefore, the responsibility is on the issuing bank to ensure that the credit is issued with correct and unambiguous terms, and the beneficiary is entitled to follow international standard banking practice in interpretation of the terms of the credit.

The same principle was used to resolve the dispute in DOCDEX Decision No. 288. Here the issuing bank rejected the documents on the basis of a discrepancy in the bill of lading, because it was not blank endorsed as required by the terms of the letter of credit. However, given the contents of the bill of lading (to order of the issuing bank), only the issuing bank could endorse it in blank, making the requirement to present such document under the letter of credit automatically unachievable by the beneficiary. Therefore, the DOCDEX Panel decided that the principle of specificity and unambiguity had been violated by the issuing bank, which rendered the credit to be unworkable. Thus, the Panel continued, the responsibility of the issuing bank

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[1139] See DOCDEX Decisions No. 210, 257, 345.

[1140] See the discussion about the core trade finance principles in section 3.2.1 of Chapter 3.

[1141] Here reference was made to the ICC Opinions TA629 (2008), R340 (1999), R554 (2004).

prevailed whether such an inaccuracy was made deliberately or inadvertently.[1142]

In addition, the Panel in DOCDEX Decision No. 337 further extended the validity of the principle to any amendments to the terms of the credit. Whilst the Panel confirmed the right of the issuing bank to amend the terms of the letter of credit, it pointed out that the manner and wording of the amendment in question was opaque and unusual in the context of international standard banking practice and "represented a very detrimental deviation from the principles of the UCP 600".[1143]

In DOCDEX Decision No. 312 the dispute in question was between the issuing bank and the applicant company, which claimed that the bank had been wrong in examination of the bill of lading and declaring it as compliant with the terms of the letter of credit. The applicant based its arguments on the fact that the signature on the bill of lading belonged to the forwarder and not to the carrier as specifically required by the letter of credit. It also stated that the bank should have made proper investigation as to whether the forwarder was performing the functions of the agent on behalf of the carrier.

On both of these issues the DOCDEX Panel ruled in favour of the issuing bank relying on the principle that, in documentary credit transactions, banks deal with the presented documents only and are not expected to investigate any other additional facts or underlying issues of a sale transaction. Thus, as the presented bill of lading provided that it was signed by a person "as agent on behalf of the carrier", on its face it constituted a complying presentation and the issuing bank was correct in honouring it under the UCP.

The applicant company brought the dispute to a Singaporean court[1144] adding some additional evidence in support of its arguments. In particular, it claimed that the bank: a) could not had been unaware that the signature belonged to a well-known international freight forwarding (not carriage) company; b) having been involved in the previous transactions between the applicant company and the seller, should have been aware which freight carrier company is usually used by the seller; and c) that there had been another bill of lading issued four days later by a proper carrier.

George Wei JC referred to the DOCDEX Decision and, whilst stating that his reasoning was not solely based on the findings of the DOCDEX Panel because such findings were not in any way binding, described it as having a "persuasive value" and completely mirrored the position expressed in DOCDEX Decision No. 312 that an issuing bank was only concerned with the presented documents and other facts were irrelevant.[1145]

The principle of independence (autonomy) of letters of credit from the underlying transaction

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[1142] See also DOCDEX Decision No. 298.
[1143] See DOCDEX Decision No. 337 as reported in Collyer and Meynell (n 1061) 78.
[1144] *Abani Trading Pte Ltd v BNP Paribas and another* [2014] SGHC 111, 13-14
[1145] ibid 47-50.

has been commonly used by Panels in two situations. Firstly, the independence principle is applied to the presentation of documents under the letter of credit, resulting in each presentation of documents being independent from previous or subsequent presentations. This was highlighted in DOCDEX Decisions No. 213 and No. 227. In both of these cases the issuing banks rejected the initial presentation of the documents due to some discrepancies, but subsequently accepted the same documents under the second presentation. The advising banks claimed that due to the subsequent approval of the same documents presented, the issuing banks invalidated previously identified discrepancies. However, the Panels stated that the principle of independence of letters of credit results in issuing banks having the right to treat each presentation of documents independently from either preceding or subsequent presentations. Thus, the issuing banks were not obliged to accept similar discrepancies in future, unless local law required otherwise.[1146]

Secondly, and most commonly, the independence principle is relied upon in relation to the only exception to this principle, namely the fraud exception. DOCDEX Panels have been consistent in reminding parties that the fundamental obligation of banks in letter of credit transactions is to examine the documents on their face, and therefore, the banks cannot refuse the presentation on the basis of any fraud suspicions, written or oral allegations/information from parties, etc.[1147] Furthermore, the banks are not obliged to make any investigation of such matters.[1148]

The only situation wherein banks can rely on fraud exception and can suspend their irrevocable undertaking under a letter of credit without being subject to liability from wrongful dishonour is when such fraud is established by a court or arbitral tribunal.[1149] This is because the UCP (as well as other uniform rules issued by the ICC) does not contain any provisions with regards to fraud and its treatment.[1150] Thus, any fraud allegations should be examined by a competent court or tribunal pursuant to applicable law on a case-by-case basis.[1151] Accordingly, DOCDEX is not the forum for examination and/or establishment of fraud.

At the same time, the above approach of fraud exception being valid and applicable only if supported by a respective order from a court or arbitral tribunal can sometimes be damaging to the actors in a letter of credit transaction. Such damage occurs when courts or arbitral tribunals disregard the fundamental independence (autonomy) principle of the functioning of letters of credit, thus providing a significant threat to the reliability of this instrument of payment in international trade. DOCDEX Panels, having been consistently accentuated the superiority of local law, including any court orders and arbitral decisions, over any ICC issued soft law,

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[1146] Reference was also made to ICC Opinion R332 (1999).
[1147] See DOCDEX Decisions No. 218, 238, 261, 268, 277, etc.
[1148] See DOCDEX Decisions No. 229, 230, 232, etc.
[1149] See DOCDEX Decisions No. 218, 229, 230, 232, etc.
[1150] See DOCDEX Decisions No. 229, 268, 277, 291, 308, 316, 317, 349, etc.
[1151] ibid.

cannot overrule any such aberrant judgments or awards in which the independence principle has been gravely violated. The most evident examples of that are DOCDEX Decisions No. 314 and 317.

In DOCDEX Decision No. 314 the presentation of documents by the beneficiary was confirmed as compliant by the issuing bank, but the applicant initiated arbitration against the beneficiary on the basis of the sale of goods contract and obtained a court order prohibiting the issuing bank from making payment to the beneficiary. The issuing bank did not dispute its obligation to pay and in fact requested the court to remove the freezing order in order to perform its duties to the beneficiary pursuant to UCP (at the time of this DOCDEX Decision such request had not been considered by the court, thus its outcome is not known). The DOCDEX Panel stated that the independence principle of the letters of credit should be upheld to the fullest extent possible and any court interference that prevents the bank from fulfilling its obligation under a letter of credit transaction should be based on very strong arguments, such as fraud. The mere existence of a dispute between the applicant and the beneficiary does not by itself constitute a reason for not honouring the credit, especially given the fact that the issuing bank is liable for honouring the credit, pursuant to timely and complying presentation, from the time of issuance of such letter of credit. However, the issuing bank cannot ignore a court order prohibiting payment.

In DOCDEX Decision No. 317 the beneficiary made a complying presentation and the issuing bank agreed to pay the amount under the letter of credit on the maturity date. However, before the maturity date the issuing bank had notified the beneficiary that it could not make the payment due to an injunction order. According to the facts of the case, this court order was not only made without any notification to the beneficiary, but was also brought by a third party under a different letter of credit transaction. The Panel again accentuated the importance of the independence principle of letters of credit, specifying that under all circumstances the court in this case had prohibited payment with reference to a different transaction and a different letter of credit without making any reference to irregularity or unlawfulness of the transaction in question. This was highly unusual, the Panel continued, and it would be at least expected that any freezing order of the funds payable under the letter of credit would be related to the transaction covered by that documentary credit. However, as in DOCDEX Decision No. 314, the issuing bank could not ignore the court order.

Thus, in both these cases DOCDEX Panels dismissed the claims of the beneficiaries and acquiesced to the terms of the courts' freezing orders. At the same time, the reasoning given in these two Decisions was seemingly addressed more to the courts that issued such injunction orders rather than the parties. In fact, pernicious interpretation and egregious application of trade finance principles and accompanying industry regulations by national courts seem to be a common issue. In an earlier DOCDEX Decision No. 229 the Panel pejoratively interpolated,

as *obiter dictum*, that "an effort by banks to educate the judicial systems within their countries in the principles of the UCP will be useful to help courts judge cases properly".[1152]

5.3.4.3. Development of new practices and standards

This last category of DOCDEX activities is setting up new practices and standards. Thus far this has been a minor portion of all activities, but following the changes to DOCDEX Rules in 2015[1153] it may become the most important. This category deals with situations wherein neither the ICC-developed rules nor international trade finance practice have any clear guidance with regards to a certain aspect and its practical application.

The example of such matter can be found in DOCDEX Decision No. 242. In this decision a number of issues with regards to the treatment of certain terms and conditions of the letter of credit were raised which were not covered by the UCP. One of the issues was to determine whether the issuing bank returned the dishonoured documents to the presenter in a timely manner. Whilst there is some specific timeframe established for examination of documents and provision of the notice of refusal, there is no qualification period for returning dishonoured documents to the presenter specified in the UCP (the issue concerned the UCP 500). This was noted by the panel as well as the fact that ICC Opinions also did not clarify the issue. Therefore, the Panel, resorting to international standard banking practice and market expectations of the businesses, highlighted the importance associated with possession of the title documents and, consequently, the need for priority processing in order to timely return the dishonoured commercial documents because any delay in this process may prejudice the beneficiary's rights and security. Thus, whilst stating that it did not have relevant authority to set the precise time limit for returning the documents, the panel came to the conclusion that the minimal accepted standard for the return of any dishonoured documents should be without delay and by expeditious means once the notice of refusal was sent. As for the case presented to the panel, the delay in returning the documents lasting between 12 and 26 days following the notice of refusal was deemed to be unreasonable and the one that "fails to comply with the spirit, if not the letter of the UCP".[1154]

In fact, this DOCDEX Decision was crucial to the outcome of litigation in English courts.[1155] In *Fortis Bank SA/NV and another v Indian Overseas Bank*[1156] both the High Court and the Court of Appeal were persuaded by the experts' findings on the applicable minimal standard for return of the documents treating their position as evidence of indisputable, normal and

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[1152] Collyer and Katz, *Collected DOCDEX Decisions 1997-2003* (n 596) 115.
[1153] See section 5.2.1 of this chapter.
[1154] See DOCDEX Decision No. 242 as reported in Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2004-2008* (ICC Publication No. 696 2008) 53.
[1155] Ebenezer Adodo, 'Article 16 of UCP 600: the Time Frame for Returning Rejected Documents and Consequences of Its Breach' (2011) 26 (11) Journal of International Banking Law and Regulation 548, 553.
[1156] [2010] EWHC 84 (Comm) and [2011] EWCA Civ 58.

expected international banking and trading practice.[1157]

Another example of developing new trade-finance practice is found in DOCDEX Decision No. 215. Here, the advising banks found presentation under the letter of credit discrepant due to several issues, one of which was the fact that there had been some alterations and corrections to the cargo receipts which, in the opinion of the issuing banks, were improperly authorised by the carrier who issued these documents. The beneficiary argued otherwise and claimed that the documents were in compliance with the terms of the letter of credit. When considering this issue the DOCDEX Panel focused its attention on the appropriate mode for making any alterations or corrections. However, it found that not only the UCP is silent on this issue, but not a single ICC Opinion issued at the time of the case dealt with this question (the available Opinions dealt with corrections on a transport document, but a cargo receipt is not a transport document). Therefore, the Panel came to the conclusion that as long as the correction was made by the issuer of the document other than a beneficiary, this was not a discrepancy. To authorise such a correction or alteration a signature of the general manager of the issuer was required. Thus, the discrepancies pointed out by the issuing banks were declared invalid.

However, following the DOCDEX Decision the issuing banks refused to pay under the letter of credit, so the beneficiary had to resort to litigation, in which one of its supporting arguments was the DOCDEX Decision No. 215. Having analysed the DOCDEX Decision, Hon Stone J of the High Court of the Hong Kong Special Administrative Region stated that the arguments of the respondents (the issuing banks) presented in the court hearing must have been placed before the DOCDEX Panel, but nevertheless were rejected.[1158] Thus, he fully agreed with the DOCDEX Panel's conclusions and ruled in favour of the beneficiary.

Furthermore, the position expressed in this DOCDEX Decision No. 215 was later reflected in the section 'Corrections and alterations' in the first issue of the ISBP in 2002 and its further revisions in 2007 and 2013. Thus, it has now become a codified trade finance practice.

5.3.5 Support by national courts

In the context of discussion about DOCDEX, it is important to assess the treatment of and reliance placed by national systems, and courts in particular, on DOCDEX decisions, since such decisions are generally not binding and are not based on any national law. As have been shown in section 4.3.4 of Chapter 4, the CAS awards, even those based on *lex sportiva*, are almost never overturned by national courts. Similarly, and probably more relevant in the context of DOCDEX, the courts rarely overrule the decisions rendered pursuant to the UDRP

[1157] See *Fortis Bank SA/NV and another v Indian Overseas Bank* [2010] EWHC 84 (Comm), 74 and *Fortis Bank SA/NV and another v Indian Overseas Bank* [2011] EWCA Civ 58, 35. See also Roger Fayers, 'Rejection of Documents and Preclusion' (2010) 16 (4) DCInsight; Mohd Hwaidi and Brian Harris, 'The Mechanics of Refusal in Documentary Letter of Credits: an Analysis of the Procedures Introduced by Article 16 UCP 600' (2013) 28 (4) Journal of International Banking Law and Regulation 146, 150.

[1158] *NEC Hong Kong Limited v the Industrial and Commercial Bank of China and Gaoming Light Industrial Products Import & Export Company of Guangdong* [2006] HCCL 60/2000, 123.

principles.[1159] Thus, the same level of support is required in order for DOCDEX Decisions to become an effective dispute resolution forum.

To date there has not been any research with regards to the treatment of DOCDEX Decisions by local courts. Indeed, this is quite a difficult task for several reasons. Firstly, each DOCDEX Decision is anonymised, thus making it impossible to trace the origin of the parties involved. Secondly, DOCDEX has been used by parties from a variety of jurisdictions, both civil and common law.[1160] Consequently, any comprehensive search in legal court judgment databases in many countries may be either restricted or impossible to perform due to language barriers. Thirdly, according to the ICC, it is frequent practice for parties to settle their disputes amicably following the receipt of a DOCDEX Decision without any further reference to a court.[1161]

During my research I attempted to perform this seemingly difficult task and searched for court cases wherein reference was made to a DOCDEX Decision. The results of such activity should only be indicative and ideally appropriate full-scale research is required by researchers in different jurisdictions. However, even this somewhat modest attempt produced some intriguing results and observations. Notably, DOCDEX Decisions have been largely viewed by courts worldwide as having persuasive value and evidencing international commercial practice.[1162] Furthermore, as shown in the above sections, whenever a party has presented a previously rendered DOCDEX Decision in its favour as supporting evidence, the courts have invariably resolved the matter to the benefit of such party without any deviation from DOCDEX Panels' findings.[1163] This is clearly a sign of the unchallenged support for DOCDEX outcomes by state courts in various jurisdictions, both civil (Quebec, South Korea)[1164] and common (England, Singapore, Hong Kong) law.

Moreover, since the DOCDEX process has gradually developed as a favourable option for documentary credit dispute resolution for international trade actors resulting in a steady growth of the number of rendered DOCDEX Decisions on various aspects of trade finance, state courts have started to place significant reliance on such decisions even in cases wherein neither of the parties had presented such a Decision as additional evidence.

In *Standard Chartered Bank v Dorchester LNG (2) Ltd.*[1165] Teare J made reference to

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[1159] See section 4.5.3 of Chapter 4.

[1160] See annual ICC Dispute Resolution statistics. See also Song, 'Sectoral Dispute Resolution in International Banking' (n 544) 534.

[1161] Collyer and Katz *Collected DOCDEX Decisions 2009-2012* (n 1086) 3.

[1162] *Bulgrains & Co Ltd v Shinhan* [2013] EWHC 2498 at 37; *Mizuho Corporate Bank Limited v Woori Bank* [2004] SGHC 219 at 42; *Fortis Bank SA/NV & Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA Civ 58 at 34-35; *Abani Trading Pte Ltd v BNP Paribas and another* [2014] SGHC 111 at 45-46.

[1163] In addition to the cases mentioned in section 5.3.4 of this chapter, see also *Mizuho Corporate Bank Limited v Woori Bank* [2004] SGHC 219.

[1164] Whilst I could not identify and study the court judgment, I found two reports about the District Court of Seoul supporting the position expressed in the previously rendered DOCDEX Decision No. 272 which was presented by one of the parties, see King-Tak Fung, 'A Transfer L/C Fraud Case' (2012) 18 (3) DCInsight; N.D. George, 'The Case of a Transferred L/C' (2013) 19 (1) DCInsight.

[1165] [2013] EWHC 808 (Comm).

DOCDEX Decision No. 303, even though the parties to this case did not cite such source. However, whilst reaching the same conclusion as the DOCDEX Panel, the reasoning of the judge differed from the one adopted by the Panel. In essence, Teare J took into consideration the contents of the SWIFT MT734 message in order to decide that Standard Chartered Bank rejected the documents,[1166] whilst the DOCDEX Panel stated that since the SWIFT MT734 message is named as "Advice of Refusal" it is clear that by using such message banks cannot have any intention other than to notify about the refusal of the presented documents.[1167] Such differentiation in the interpretation of the UCP and banking practices did not lead to any adverse consequences in this case, but is clearly indicative of the fact that state courts sometimes misinterpret or have a different interpretation of existing practices and usages by trade finance and banking actors.

At the same time, it is worth mentioning that DOCDEX Decision No. 303 was subsequently supported and applied in *Bulgrains & Co Limited v Shinhan Bank* by Gore QC.[1168] However, *Bulgrains & Co Limited v Shinhan Bank* is also interesting for other reasons. Firstly, both of the parties relied on DOCDEX Decisions No. 303 and No. 296 to which neither of them was a party. This case, in fact, is the only one identified wherein the court considered more than one DOCDEX Decision in the same proceedings. Secondly, when analysing DOCDEX Decision No. 296, Gore QC compared the factual circumstances of the case before him and the DOCDEX Panel and stated that due to different factual circumstances the Decision could only qualify to be of assistance in resolving the issue as to whether the notice of refusal had been sent in the manner compliant with the UCP.[1169] In DOCDEX Decision No. 296 the Panel had set out a test which, if sufficed, resulted in the issuing bank fulfilling its obligations when refusing the presented documents received under the documentary credit.[1170] This test is of significant importance because if failed the issuing bank would be precluded from claiming that the presentation was discrepant and would be obliged to honour even if the documents actually contained some discrepancies.

The crucial point of the test in this case was whether the issuing bank correctly notified the beneficiary about the disposal of the documents. In holding that the beneficiary was appropriately notified in accordance with the test as specified in DOCDEX Decision No. 296 Gore QC stated that whilst the MT734 message did not specifically indicate what the issuing bank was proposing to do with the documents, it stated "Notify as per UCP 600 article 16(c)(iii)(b)".[1171] Thus, reliance on the specific article of the UCP along with the industry term

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[1166] *Standard Chartered Bank v Dorchester LNG (2) Ltd.* [2013] EWHC 808 (Comm), 60-62.

[1167] The DOCDEX Panel also set up two exceptions to this rule, namely when a SWIFT message other than an MT734 is sent to notify refusal or in the event when a message other than SWIFT is sent directly to a beneficiary which is not a bank.

[1168] [2013] EWHC 2498 (QB), 34-42.

[1169] *Bulgrains & Co Limited v Shinhan Bank* [2013] EWHC 2498 (QB), 45-50.

[1170] As specified by the DOCDEX Panel, the refusal notice should: a) state clearly that the bank is refusing to honour or negotiate; b) state each discrepancy with them being complete and specific; and c) state the disposal of the documents pursuant to the four options available in UCP 600 sub-article 16(c)(iii).

[1171] *Bulgrains & Co Limited v Shinhan Bank* [2013] EWHC 2498 (QB), 51.

"notify" (on this point HHJ Gore QC again referred to DOCDEX Decision No. 303 as well as *Fortis Bank SA/NV and another v Indian Overseas Bank)* satisfied the requirement for informing the beneficiary about the disposal of documents.

5.4. Conclusions

In this chapter the appropriate forum for resolving disputes within *lex documentaria commercium* has been analysed. Given the role of the ICC in the establishment of *lex documentaria commercium* on a global basis (see section 3.2.2 of Chapter 3), I have argued that DOCDEX is a natural and auspicious forum for resolving disputes relating to documentary instruments. This is especially evident when compared to other specialised trade finance dispute resolution forums, which have attracted no case workload at all, thus hitherto receiving negligible interest from the market.

The nature of DOCDEX is not easily identifiable. Although leaning more towards an expert determination system, it has some unique and innovative features which clearly make it stand out and incapable of being placed under any existing conventional classification of alternative dispute resolution methods. At the same time, DOCDEX has all the necessary features of a specialised dispute resolution forum within a specific branch of *lex mercatoria*, as identified in Chapter 4: it provides for publication of *all* its decisions, such publications can be accessed publicly, the parties make references to and decision-makers cite previous DOCDEX cases, and unique trade finance norms are being developed through DOCDEX dispute resolution. The latter is of crucial importance because it further supports the unique position of DOCDEX as an industry-specific dispute resolution forum which often deals with very technical issues that do not generally dealt with in various regulatory regimes. Therefore, the development and consistency of coherent *lex documentaria commercium* is ensured through its application in DOCDEX.

Furthermore, in comparison with similar dispute resolution forums within other branches of *lex mercatoria*, during DOCDEX proceedings national law is not taken into consideration in any way. Thus, DOCDEX experts reach their conclusions purely on the basis of applicable soft law regulations, international trade finance practice and the terms of documentary instruments.[1172] In particular, this fact should give fertile grounds for the proponents of the 'purist' approach to *lex mercatoria* theory.

At the same time, contrary to the credulity of some proponents of 'purist' views[1173] on *lex mercatoria*, DOCDEX does not place itself above or replace national law regulations, it simply functions beside and complements them in matters wherein state regulation falls somewhat

[1172] However, in the light of the substantially increased scope in dealing with documentary instruments which are not subject to any of the existing ICC soft law regulations, it remains to be seen what sources a DOCDEX Panel will use during consideration of documentary instruments for which no ICC uniform rules exist. At the time of writing there have not been any such cases reported.

[1173] See sections 1.1.2 and 1.2.1 of Chapter 1.

short. As has been shown in section 3.5 of Chapter 3, the functioning of documentary instruments is one of the areas in which specific state regulation is almost non-existent. Thus, inevitably some complex issues will arise over certain aspects of documentary instruments' operations, making state regulation inept in resolving such matters without resorting to trade finance practices. Unfortunately, national courts often fail to make such resort or if recourse to market practices is made, they are interpreted aberrantly due to the dearth of any specific market understanding by judges.[1174] That was the main concern of industry players and the primary reason behind the creation of DOCDEX, *i.e.* to provide swift and inexpensive dispute resolution services for trade finance actors by trade finance specialists.[1175]

Notably, state courts in various jurisdictions have been showing hitherto unchallengeable support for DOCDEX Decisions. Moreover, in some cases courts have even consulted such decisions in order to get some guidance with regards to specific aspects of documentary instruments' functioning, albeit not always interpreting the reasoning correctly. This example of co-existence and interdependence of state and private regulatory orders supports the argument described in section 2.3.3 of Chapter 2 that nowadays state law and *lex mercatoria* (its *lex documentaria commercium* branch in this context) do not compete, but are intertwined and successfully complement each other. In the case of DOCDEX, this is also indicative of the trust in and reliability placed by national courts on this system.

Thus, summarising the above, DOCDEX has all the features to ensure the coherent and consistent development of *lex documentaria commercium*. Therefore, it constitutes the last, albeit most important, piece of the puzzle for answering the research question introduced in section 1.4 of Chapter 1, *i.e.* the existence of a separate branch of *lex mercatoria* in the area of trade finance. As has been demonstrated in Chapter 3, *lex documentaria commercium* satisfies such criteria for being recognised as a separate branch of *lex mercatoria* as having unique industry-specific principles and being promulgated by a leading private industry association that receives unchallenged support for its activities from states and the international community (see criteria a-c outlined in section 2.4 of Chapter 2). In this chapter the last criterion has been successfully applied (see criterion d specified in section 2.4 of Chapter 2), proving DOCDEX as an industry-specialised dispute resolution forum for *lex documentaria commercium*. Consequently, I can assert that *lex documentaria commercium* has met *all* the criteria identified to be recognised as a separate branch of *lex mercatoria*.

[1174] Brown (n 1059) 9-11; Connerty, 'Documentary credits' (n 1060) 68; Song, 'Sectoral Dispute Resolution in International Banking' (n 544) 536-543.

[1175] Connerty, 'Documentary credits' (n 1060) 67-68. See also Collyer and Katz, *Collected DOCDEX Decisions 1997-2003* (n 596) 3; Collyer and Katz, *Collected DOCDEX Decisions 2004-2008* (n 1154) 3.

CHAPTER 6. CONCLUSIONS

This last chapter provides a summary of the research findings, lists limitations of the conducted study and offers directions for potential further research based on current findings. The chapter finishes with some concluding remarks on the overall landscape for the development of modern international commercial law in the light of the conducted study.

6.1. Research findings

This thesis is a direct result of professional curiosity sparked by a spontaneous encounter with an unusual trade finance dispute resolution platform (DOCDEX) which went against most expectations and instincts of a legal specialist. The fact of dispute resolution detached from any national legal system clearly confused (if not alarmed) many of my law colleagues at the time and resulted in an unwillingness to deal with it. Luckily, I have preserved my personal interest in this phenomenon and later decided to embark on an academic path to explore it in greater detail.

This journey has led to even more exciting discoveries, such as the successful functioning of a number of innovative dispute resolution systems in certain industries. Remarkably, these essentially private systems have many similarities, such as their approach towards the treatment of past cases and building consistent case law, publication of disputes' outcomes and development of new norms through dispute resolution. These features make such dispute resolution systems to stand out and clearly challenge the long-established approach to the treatment of private dispute resolution under which it is predominantly characterised as confidential and is thus incapable of producing consistent outcomes. Linking these observations with the theory of *lex mercatoria* has resulted in a number of other interesting findings and determines the central question of my research inquiry, namely the existence of a separate branch of *lex mercatoria* in the area of trade finance. In order to explore and answer this question, I have taken several important steps as described below.

In Chapter 1 I set the scene for this thesis with a description of the historical development of *lex mercatoria*, its revival and theoretical progression of the concept in the 20th century as well as views of academics and practitioners about it. Specific attention was dedicated to the area of trade finance (in particular, documentary instruments) and its special place and role in the overall development of *lex mercatoria*. This chapter also described the aims and methodology of the research as well as the structure of this thesis.

In Chapter 2 I analysed relevant academic literature in order to identify the reasons for separation of *lex mercatoria* into specific branches and elaborate certain non-exhaustive criteria for a branch of *lex mercatoria* to be recognised. As argued, globalisation and

consequent rise of authority of private industry associations along with the rise of private industry-specific dispute resolution were the primary reasons for the fragmentation of *lex mercatoria*. Furthermore, upon the analysis of similarities among different branches of *lex mercatoria* I concluded that in order to qualify as a separate branch of the modern law merchant any new branch should conform to the following non-exhaustive criteria:

a) the availability of industry-specific principles, customs and usages relevant to a particular area;

b) the presence of a leading private industry association, which develops and promotes such industry-specific principles, customs and usages;

c) the support of states and the international community for the activities of such private industry association;

d) the availability of a leading industry-specific dispute resolution authority in the relevant area.

Importantly, this chapter also concluded that the modern *lex mercatoria* (and its branches) and national law are interdependent and intertwined and can harmoniously and effectively co-exist in the regulation of commercial activities. Thus, contrary to prevailing academic opinion, the modern *lex mercatoria* and national law should not be viewed as exclusive of each other. In another important finding of this chapter I expressed doubts about the existence of *lex petrolea* as a separate branch of the modern law merchant because of its weak theoretical basis and inability to meet most of the criteria outlined above.

In Chapter 3 I applied the first three criteria identified in Chapter 2 (from a to c as listed above) to the area of trade finance and concluded that the new branch of *lex mercatoria*, namely *lex documentaria commercium*, complies with such criteria. In particular, it has two cornerstone principles, specifically the independence (autonomy) principle and the principle of strict compliance, which form the basis of regulation in the area and have resulted in additionally elaborated principles and rules. The ICC is clearly the leading private industry association in the area of trade finance which is responsible for the development and promotion of trade finance regulation. Moreover, the ICC attracts wide support from governments and other public bodies and became the first ever private organisation to acquire Observer Status at the United Nations.[1176] Thus, the rules and regulations of the ICC usually receive the utmost support not only from commercial actors, but also from public actors. Most notably this is because only in rare instances does national law provide for specific regulatory provisions with regards to the regulation of documentary instruments and fully delegates such prerogative to ICC-developed soft law.

Moreover, in this chapter I also showed that this new branch of the law merchant in the area

[1176] 'ICC granted UN Observer Status' (*ICC*, 13 December 2016) <https://iccwbo.org/media-wall/news-speeches/un-general-assembly-grants-observer-status-international-chamber-commerce-historic-decision/> accessed 20 September 2019.

of trade finance is not simply an abstract concept, but is well defined in a number of sufficiently sophisticated sources that offer efficient solutions as the primary governing regime for documentary instruments. In fact, such a regime of *lex documentaria commercium*, given the absence of any national law authorities, can effectively be used in practice and specifically assist with the problem of the governing law of documentary instruments, as was shown in the example of letters of credit regulation.

Chapter 4 was dedicated to dispute resolution in branches of *lex mercatoria*. In this chapter I analysed several non-state industry-specialised dispute resolution systems operating in the branches of the law merchant. It was demonstrated that these sector-specific dispute resolution centres share some common features that distinguish them from traditional private conflict resolution providers and aid considerably the development of consistent and coherent law merchant. Thus, following the conducted analysis it was shown that, except for *lex petrolea*, each branch of the modern law merchant has a leading industry-specific dispute resolution platform which handles the majority of disputes in the respective field: the CAS in *lex sportiva*, the panels under the UDRP in *lex informatica* and the SMA and the LMAA (both of which refer to each other's dispute resolution outcomes) in *lex maritima*. Importantly, all of these dispute resolution centres rely on past precedents, which ensures consistency in their decision-making. However, the nature of these precedents is not comparable to judicial precedent as known in common law and is often referred to as persuasive precedent (*jurisprudence constante*)[1177] or *de facto* precedent.[1178] Nevertheless, the consistent reliance on these precedents clearly makes these private dispute resolution systems stand out. In fact, such reliance on past decisions effectively rebuts the prime argument of the opponents of *lex mercatoria*[1179] about the impossibility of building a consistent and coherent body of law via private dispute resolution.

Moreover, another important feature of dispute resolution in the branches of the law merchant is that outcomes (arbitral awards, decisions, etc.) of the above leading industry-specific dispute resolution platforms are routinely published. This, again, represents a significant departure from the conventional approach that private dispute resolution is confidential and thus the wider public is precluded from accessing its outcomes. In addition to the above, dispute resolution outcomes in the branches of *lex mercatoria* are rarely overruled if challenged in national courts,[1180] thus evidencing trust and support from such courts and, consequently, states which sanction and enforce these outcomes.

Last, but not least, in this chapter I analysed the contents of these dispute resolution outcomes

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[1177] Kaufmann-Kohler (n 138). See also Mourre (n 706) 54; Alexis Mourre, 'Arbitral Jurisprudence in International Commercial Arbitration' (n 710).
[1178] Béguin (n 702) 7.
[1179] See the discussion in section 1.3 of Chapter 1.
[1180] See the points made in sections 4.3.4, 4.4.1 and 4.5.3 of Chapter 4.

(arbitral awards, decisions, etc.) and found some clear evidence of the development of new norms through dispute resolution. The CAS often refers to *lex sportiva* in its awards, clarifies and adds new principles to this concept, which has resulted in the practice of parties relying on *lex sportiva* as the basis of their claims. Through the interpretation of the UDRP policy, panels develop new principles and set new tests for meeting the requirements of *bona fide* domain registration and holding. The SMA and the LMAA often consider whether certain practices and usages can be regarded as appropriate, acceptable and well-known in the area of the maritime industry. If positive, such practices, customs and usages become standardised and incorporated in model contracts which form the basis of maritime industry functioning.[1181]

In Chapter 5 I discussed DOCDEX and applied criteria identified in Chapter 4 to DOCDEX. DOCDEX is a unique and innovative dispute resolution platform developed by the ICC. In fact, given the role of the ICC in the establishment of *lex documentaria commercium* on a global basis, it seems to be a natural development by this institution to create such a system for resolving documentary instruments' disputes. Importantly, the system has evolved from a limited service for letters of credit disputes to a universal platform for resolving any and all trade finance-related disputes (following changes introduced in 2015). Moreover, all disputes are resolved without reference to national law and purely on the basis of trade finance usages and practices as well as ICC-developed soft law.

By applying the criteria identified in Chapter 4, DOCDEX fully satisfies them and thus should be regarded as the leading dispute resolution platform for *lex documentaria commercium*. In particular, it provides for publication of all its decisions, such publication can be accessed publicly (albeit with a certain time lag in publication), the parties make references to and decision-makers cite previous DOCDEX cases, and unique trade finance norms are being developed through the DOCDEX dispute resolution process. Furthermore, dispute resolution outcomes produced by DOCDEX Panels receive the utmost support from national courts and in all cases identified, both from common and civil law jurisdictions, courts have invariably resolved the matter without any deviation from DOCDEX Panels' findings.

Thus, given the above, this thesis has shown that there exists a separate branch of *lex mercatoria* in the area of trade finance, namely *lex documentaria commercium*. Such branch has its distinct principles, which influence the respective customs and usages in the area, has a leading association which further develops and codifies these industry-specific principles, customs and usages, and receives unchallenged support from states and the international community for its activities. Furthermore, *lex documentaria commercium* also has a distinct dispute resolution forum, *i.e.* DOCDEX, which ensures further development and consistency of coherent *lex documentaria commercium* via significant reliance on past precedents, consistent publication of its decisions and their accessibility to the wider public. Moreover, such

[1181] Calliess and Klopp (n 98) 8; Carbonneau (n 186) 252 at note 174.

DOCDEX Decisions are well respected by national courts worldwide.

In addition, there are a number of other important findings as have been identified in this research. Among these additional findings the issue of effective co-existence of the modern *lex mercatoria* and national law as well as their interdependence is of crucial importance for the further development of international commercial law.[1182] As was shown in this thesis, branches of *lex mercatoria* need to be supported by state law, most notably for enforcement purposes. At the same time, due to limitations and the static nature of state law, branches of *lex mercatoria* are often relied upon for the efficient regulation of relations between parties. The extent of such reliance may vary considerably and sometimes may lead to full incorporation of privately developed norms into national regulation, *i.e.* percolation from informal law to formal law through a practice-driven route as stated by Levit.[1183]

This thesis also puts forward strong arguments that private dispute resolution is the key driving source of the modern *lex mercatoria* and its branches. As identified, within each branch of *lex mercatoria* (except for *lex petrolea*, see discussion below) there is a clearly identifiable private dispute resolution centre (two in the case of *lex maritima*) which handles the majority of industry-related disputes, including on the basis of industry-specific principles, customs and usages. Moreover, each of such dispute resolution centres places significant reliance on its past decisions and publishes the respective outcomes. This is a vitally important finding because it addresses the criticism expressed by many opponents of *lex mercatoria*, namely the impossibility of building a consistent body of law through private dispute resolution. In fact, it is to the contrary: as argued in this thesis, dispute resolution is the key driving force of the modern law merchant (and its branches) and ensures its liveliness and further development.

Last, but not least, based on the criteria identified in this research, it is suggested here that *lex petrolea* does not qualify as a separate branch of *lex mercatoria*. In the course of the research I was unable to identify any specific principles, customs and usages which are used in the petroleum industry.[1184] In fact, the authors arguing for the existence of such principles and customs often list general principles of law as applied in the context of the petroleum industry. In addition, there is a variety of private industry associations which provide guidance towards certain aspects of petroleum industry regulation, but there is no leading body in the area, which would develop and promote new industry-specific norms. However, the most evident factor as to why *lex petrolea* cannot constitute a separate branch of the modern law merchant is the absence of a dispute resolution authority that resolves disputes on the basis of *lex petrolea*.

[1182] In fact, this study complemented and added insights to the ideas expressed by Michaels, 'The True *Lex Mercatoria*' (n 1); Juenger (n 140); Saidov (n 140).

[1183] Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 173.

[1184] Perhaps only stabilisation clauses and their content can be named as a unique feature relevant to the petroleum sector, see Bowman (n 252).

6.2. Limitations and directions for further research

Every academic research has its limitations and, despite the best efforts made, mine is not an exception. Below is a summary of such limitations with regards to each chapter of this thesis. At the same time, the limitations encountered during this study can be addressed in and be the subject of further research.[1185] In particular, further research can be divided into three main directions: (a) correlation of national law and the modern *lex mercatoria*; (b) outline of the parameters of *lex documentaria commercium*; and (c) DOCDEX as a leading dispute resolution forum for *lex documentaria commercium*.

In Chapter 2 I discussed the reasons for separation of the modern *lex mercatoria* into a number of different branches. The aim of the chapter was to identify similarities among branches of the modern *lex mercatoria* and thus identify applicable criteria for a new branch. Naturally, as emphasised in the chapter, it should not be considered that the presence of industry-specific principles, customs and usages and the availability of a leading private industry association that develops and promotes new norms should be viewed as exhaustive and exclusive criteria. Instead, such criteria should be regarded as of *key* importance without which no branch of the modern *lex mercatoria* can be identified. Thus, further research and elaboration of any additional criteria for a new branch of *lex mercatoria* to be recognised is required.

Furthermore, in this Chapter I also identified that national law and the modern *lex mercatoria* are interdependent and intertwined and this symbiotic relationship results in more efficient regulation of commercial relations. However, the extent of such interdependence needs to be examined further. Specifically, as seen in certain branches of *lex mercatoria,* such as *lex sportiva* and *lex documentaria commercium*, domestic law often explicitly encourages parties to refer to and govern their relations by non-national regulations. Moreover, as correctly noted by Levit, current classification of legal norms into hard and soft law has been clumsy and too rigid to accommodate the breadth, depth and dynamism of the contemporary international law-making process, especially given that there is a host of international instruments that fall somewhere in between and may defy this comfortable categorization.[1186] This is especially visible in *lex documentaria commercium*: for example, as shown in sections 3.2.3.2.1 and 3.5 of Chapter 3, the UCP, which is essentially a form of soft law and private law-making, has been widely treated in the same manner as hard law and even given the authority of hard law by some states.[1187]

In Chapter 3 the case was made for *lex documentaria commercium* as a separate branch of

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[1185] See, for example, James Olufowote, 'Limitations of Research' in Mike Allen (ed), *Encyclopedia of Communication Research Methods* (SAGE Publications 2017) 863-864.

[1186] Janet Levit, 'The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits (2004) 45 Harvard International Law Journal 65, 138-139; Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 209.

[1187] In her later article Levit describes this process as "bottom-up international lawmaking [which] is a soft, nonchoreographed process that produces hard legal results", see Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 129.

lex mercatoria to be recognised having regard to its alignment with the criteria for a branch of the modern law merchant. Whilst *lex documentaria commercium* satisfied the criteria identified, further research is required for identification of the precise parameters of such a branch.[1188] Understanding what is and what is not regulated by *lex documentaria commercium* can provide further insights into the overall development of this branch. However, given the above finding of beneficial co-existence and interdependence of the modern law merchant and national law, it is not an easy task to establish clear borderlines of each. In particular, as suggested by the overreaching theme of this thesis, one such dimension to examine the borders of each branch of *lex mercatoria* is by examining the boundaries of dispute resolution services by a leading provider available in the branch (in particular, this follows from the underlying discussion in Chapters 4 and 5). For example, in the case of *lex documentaria commercium*, DOCDEX Panels have consistently emphasised that the scope of the system allows them to deal exclusively with the regulation of documentary instruments, and therefore any matters that require reference to any national law are not considered. Similarly, panels under the UDRP limit their jurisdiction to the determination of the issue of *bona fide* domain name registration and holding pursuant to paragraph 4 of the UDRP policy.[1189] No other matter can be considered by a UDRP panel and therefore the borders of *lex informatica* are currently limited only to this aspect of Internet regulation, *i.e.* not the whole cyberspace as argued by several scholars.[1190]

Furthermore, another interesting question connected with the outline of borders of *lex documentaria commercium* is its subject of regulation. Clearly, *lex documentaria commercium* deals with the governance of documentary instruments as a means of payment in international trade. This includes such instruments as letters of credit, stand-by letters of credit, demand guarantees (also known as performance bonds), documentary collections, bank payment obligations, etc. However, there are other essentially non-documentary instruments, such as trade and syndicated loans, derivatives, etc., which have gradually evolved from being exclusively means of attracting financing to payment instruments in international trade. Can (or should) *lex documentaria commercium* regulate these matters too? With further technological developments and expansion of modern commerce into new niches there might be other instruments of payment developed in future which have some similarities with traditional documentary instruments, and thus might be subject to *lex documentaria*

[1188] In fact, this question is not limited to *lex documentaria commercium*, but is also relevant to other branches of the modern law merchant, especially in the light of the above finding of interdependence of *lex mercatoria* and national law

[1189] At the same time, parties often rely on certain national law when submitting their claims, see section 4.5.3 of Chapter 4.

[1190] Patrikios, 'Resolution of Cross-Border E-Business Disputes' (n 138) 297; Mefford (n 103) 231.

commercium regulation.[1191]

In addition, in Chapter 3 the illustrative example of the problem of identification of governing law in documentary instruments was given on the basis of letters of credit as the most well-known and frequently used type of a documentary instrument in international trade. Whilst it is submitted here that the problem of determination of the governing law is similar to and inherent in all documentary instruments, it may be that in certain types of documentary instruments the approaches to resolving such a problem differ. In particular, this might be the case with demand guarantees, especially given the clear incentive provided in the URDG to subject this type of documentary instrument to a particular national law. Also, whilst concentrating on the common law approach, the approaches used in civil law countries may differ and thus be worth examining for the purposes of getting a more comprehensive understanding of the subject.

Chapter 4 discussed various private dispute resolution systems within branches of *lex mercatoria*. Whilst I aimed for a comprehensive analysis of the relevant dispute resolution forums' functioning, there were several obstacles to this. In the context of *lex maritima*, any proper analysis of arbitral awards of the LMAA is virtually unachievable due to their limited and unstructured publication. In fact, as emphasised in section 4.4.2 of Chapter 4, it is not an LMAA award, but a summary of such an award that is published. Unless and until the policy of the LMAA with regards to publishing of the awards is changed, there is very limited scope for enhancement of the analysis of LMAA practice. With regards to the SMA, limitation of the search function embedded into the LexisNexis search engine and inconsistent use of nomenclature by SMA Tribunals when citing previous awards have probably impacted the results of my manual search. Therefore, the amount of references to previously rendered awards could well be more significant. In the context of *lex sportiva* and analysis of CAS jurisprudence, a handful of CAS awards were issued in the French language. Due to my limited knowledge of French, I could not comprehensively study these awards and therefore excluded them for the purposes of my analysis. Comprehensive analysis of all (or even the majority) of UDRP Panels' decisions is not practically achievable due to the sheer amount of such decisions (likely to be close to 100,000 by the end of 2019 if not earlier). Therefore, when discussing these decisions I relied heavily on the data provided by WIPO.

Chapter 5 of this thesis was dedicated to the analysis of DOCDEX as a prime dispute resolution platform for *lex documentaria commercium*. Whilst the analysis was conducted predominantly

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[1191] As a matter of discussion, there are arguments for *lex financiaria* which covers the markets for financial derivatives and credit default swaps, see Johan Horst, 'Lex Financiaria. Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA)' (2015) 53(4) Archiv des Völkerrechts 461 and his yet to be published book Johan Horst, Transnationale Rechtserzeugung: Elemente einer normativen Theorie der Lex Financiaria (Mohr Siebeck, 2019). See also Noah Vardi, *The Integration of European Financial Markets* (Routledge 2011) 117-121, 160-166. There are also claims for emerging *lex financiera* which covers international financial regulation generally, see Lastra, 'Do We Need a World Financial Organization?' (n 1071); Rosa Lastra, 'The Quest for International Financial Regulation' (n 1071); Cottier, Jackson and Rosa Lastra (n 1071) 423. In addition, with the recent rise of blockchain technology and the appearance of related cryptocurrencies, some scholars have attempted to link these developments to *lex mercatoria*, see Ewa Fabian, 'Blockchain, Digital Music and *Lex Mercatoria*' (2017) 14 US-China Law Review 852.

through the examination of features identified in Chapter 4 and for the purposes of identification of DOCDEX as a leading dispute resolution authority in the area of trade finance, clearly, there are certain limitations in such analysis and further comprehensive research is necessary. Firstly, in the analysis conducted I relied on and supported my findings following examination of DOCDEX Decisions rendered to date as provided in four volumes of Collected DOCDEX Decisions issued to date (from 1998 to 2016). Importantly, these Collected Decisions did not include Decisions rendered under the revised DOCDEX Rules in 2015. As mentioned in section 5.2.1 of Chapter 5, the amendments to DOCDEX Rules in 2015 were of crucial importance and resulted in the system not being limited to the ICC uniform rules only, but being capable of resolving any and all trade finance disputes. Thus, following these changes the system has effectively become a universal platform for dispute resolution in trade finance. However, to date there have not been any cases reported that had been dealt with under the modified DOCDEX Rules. Since the Trade Finance Channel of the ICC Digital Library has not yet been updated,[1192] it seems that such new DOCDEX Decisions will be available in the fifth volume of Collected DOCDEX Decisions, which should be released approximately in 2020-2021.

Secondly, as specified in section 5.3.5 of Chapter 5, DOCDEX receives unchallenged support from national courts in different jurisdictions, both common and civil law, which has resulted in courts invariably resolving the matter without any deviation from DOCDEX Panels' findings. However, my finding is based on a limited amount of cases in which a DOCDEX Decision was presented and discussed in courts. This is because of some objective and subjective limitation factors, such as the anonymity of DOCDEX Decisions, accessibility and search options in judiciary databases in different jurisdictions and limited language skills, etc. Moreover, it could also be because parties tend to perform a DOCDEX Decision voluntarily or agree to some settlement arrangement, and thus no court claim is made. Thus, due to the limitations outlined above, further research is required to support the conclusion of unchallenged support from national courts by stronger and broader evidence from a plethora of different jurisdictions.

Thirdly, as argued in this thesis, dispute resolution is a driving force of modern *lex mercatoria* and its branches. Therefore, a closer study of non-national dispute resolution systems would be beneficial. Whereas several such systems have received a great degree of attention (such as the CAS and dispute resolution under the UDRP), DOCDEX has largely remained out of the scope of most academic studies. Moreover, even those with sufficient subject knowledge in the area of trade finance often misunderstand the basics of DOCDEX functioning and thus produce outputs that may confuse potential readers.[1193] Perhaps this fact highlights the

[1192] As of February 2019, when the ICC kindly granted me short-term access to their Digital Library.

[1193] For example, a common mistake is treating DOCDEX as an arbitration tribunal, see Levit, 'The ICC Banking Commission and the Transnational Regulation of Letters of Credit' (n 391) 1175; Ross Cranston and others, *Principles of Banking Law* (3rd edn, OUP 2018) 511.

uniqueness of DOCDEX and difficulties in its classification under the traditional understanding of dispute resolution methods.[1194]

Indeed, a detailed study of DOCDEX and its procedure could also lead to an improvement of the system overall. As was mentioned in section 5.2.3 of Chapter 5, there are a number of problematic aspects of DOCDEX Rules which may inhibit the system in its effective functioning. These include, for example, Article 2(3) of the DOCDEX Rules which creates a situation that clearly prevents DOCDEX from becoming a universal dispute resolution forum in trade finance, and the issue of the unknown identity of decision makers (experts) that might raise questions of procedural due process violation.[1195] Moreover, further academic inquiry is particularly relevant with regards to the contentious issue of the non-binding nature of DOCDEX Decisions, unless the parties agree otherwise prior to the commencement of the proceedings.[1196]

This might also have some far-reaching policy implications with regards to the direction of the further development of DOCDEX as a dispute resolution service. At present, there are several such directions. For example, DOCDEX might be specified as a mandatory dispute resolution option in the next revision of ICC-developed uniform rules for documentary instruments,[1197] *i.e.* similar to the approaches seen in the Olympic Charter[1198] and WADA Code[1199] for the CAS, or ICANN's Registration agreement for the UDRP.[1200] Another direction is the development of standard forms for various types of documentary instrument by the ICC with the specification of DOCDEX as the dispute resolution forum (the analogous approach to BIMCO's standard form contracts and specification of the LMAA therein).[1201]

Moreover, potentially DOCDEX may be transformed into an arbitration forum, especially given the fact that a DOCDEX clause (under which all disputes arising out of or in connection with a documentary instrument shall be finally settled under a DOCDEX Decision in accordance with the ICC DOCDEX Rules, giving DOCDEX the exclusive jurisdiction to hear such disputes) is now becoming more common in international trade practice.[1202] Whilst an initial look seems to suggest that arbitration in trade finance generally is ill-fated (see the examples of ICLOCA and P.R.I.M.E. in section 5.3.1 of Chapter 5, which have a zero case load), a closer and thorough

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[1194] Chung (n 496) 1378; Connerty, 'DOCDEX' (n 1064) 529; Park (n 1064) 242; Connerty, 'Documentary credits' (n 1060) 71.
[1195] Whilst the ICC, and the Banking Commission in particular, carefully checks qualifications and independence before appointing any experts to a case, it remains unclear as to whether in all jurisdictions it will be acceptable as expert evidence, see Ellinger and Neo (n 388) 419.
[1196] Article 2(6) of the DOCDEX Rules.
[1197] See suggestion by Chang-Soon Thomas Song in his article 'Enhancing the Credibility of the Letter of Credit in UCP Revision' (2015) 2 Trade Services Update: "The article would be worded as follows: Unless otherwise agreed, all disputes arising from the letter of credit issued under the UCP will be subject to the decisions of the DOCDEX".
[1198] See Article 61 of the Olympic Charter.
[1199] See numerous references to the CAS in the WADA Code, in particular Articles 8.5 and 13.
[1200] See note 2 to and Article 1 of the UDRP.
[1201] See some discussion about ICC-developed model contracts and approaches taken therein in Bortolotti, 'The ICC Model Contracts' (n 450); Bortolotti, 'Towards a New *Lex Mercatoria*' (n 450).
[1202] See Song, 'Coming age of the DOCDEX Decisions' (n 1059); Sindberg, 'LC Disputes – Is DOCDEX the Answer?' (n 545). However, see doubts about the binding effect of such clause expressed by Brown (n 1059) 19.

investigation of this potential development is required, especially in the light of the recent positive change of banking and finance actors' attitude towards arbitration.[1203] In fact, Manganaro argues that the ICC has "a unique opportunity, if not an obligation"[1204] to enhance the standing of DOCDEX, broaden its role and develop its full potential and impact by transforming it into an arbitration service.[1205]

6.3. Concluding remarks

This study has clearly shown how diverse and heterogeneous is the landscape of modern commercial activities and accompanying regulation. Of course, this is not a new discovery for transnational legal scholars who have long recognised that the state no longer owns international law-making, which is rather an ongoing process engaging a number of transnational actors.[1206] In fact, due to the static, rigid and localised nature of legal regulation made by states,[1207] no national law can truly achieve the goal of comprehensive and in-depth regulation of international commercial activities simply because of the complexities and fast-developing nature of current commercial activities (which is mostly due to technological progress). Therefore, a substantial proportion of regulation is developed by commercial actors through their interaction in the course of daily activities in the form of certain principles, customs, usages and practices. Notably, these principles, customs, usages and practices are progressively being summarised and/or codified in the instruments (such as uniform rules or model contracts, etc.) produced by private industry associations and thus become standard practice in respective fields, which is adhered to by all or at least the majority of commercial actors in the area.

In this thesis the above developments have been analysed in the areas of sport, Internet and the maritime industry (*i.e.*, those areas which have received particular attention in academic literature to date) and a further persuasive case has been made for the area of trade finance. Likely, there are more of such areas.[1208] However, making a bold statement about the existence of a separate branch of *lex mercatoria* in a certain area simply due to the existence of particular principles, customs, usages and business practices is not sufficient and could well

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[1203] Historically litigation has been a preferred method of dispute resolution in banking and finance, but in the wake of the global financial crisis in 2008 international arbitration has been viewed as an important alternative to litigation, see Financial Institutions and International Arbitration (ICC Commission on Arbitration and ADR Task Force Report 2016) 2.

[1204] Manganaro (n 39) 290.

[1205] ibid.

[1206] Levit, 'A Bottom-up Approach to International Lawmaking' (n 144) 130.

[1207] Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order' (n 67) 986-987; Goldman (n 69) 114.

[1207] Goode, 'Usage and Its Reception in Transnational Commercial Law' (n 70) 36; Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (n 70) 542.

[1208] For example, several academics have argued for *lex constructionis* in the area of international construction, see Molineaux (n 104); Franco Leguizamo and Camilo Armando, 'From *Lex mercatoria* to Lex Constructionis (De La *Lex mercatoria* a La Lex Constructionis) (2007) 6(1) Revist@ e-mercatoria.

lead to some rather misleading[1209] or overreaching conclusions.[1210] Therefore, clear criteria should be elaborated. This study has offered several and has particularly emphasised the importance of industry-specialised dispute resolution. Analysis of such dispute resolution has resulted in the identification of a number of similar features which are clearly distinct from what is generally perceived to be features of private dispute resolution.

As emphasised by a number of scholars,[1211] it seems that today the question of *lex mercatoria*'s existence is considered to be a legal reality (especially in the context of international commercial arbitration) and therefore academic inquiry has shifted towards determination of the boundaries of the law merchant. Yet, some authors seem to have interpreted this question differently and focused on determination of which body should prevail in the regulation of commercial activities.[1212] In particular, there are a number of proponents of a purist view on *lex mercatoria* theory who claim that national law should have only a residual role[1213] in the regulation of commercial activities or even be completely disregarded in favour of *lex mercatoria*.[1214] Perhaps this might be achievable in a long-term perspective, but under present circumstances such view seems rather utopian. Not least this is because some of the followers of such a purist view draw inappropriate parallels with the functioning of the law merchant in the Middle Ages.[1215] Surely, the range and variety of commercial activities, the pace and quality of technological progress, previously unseen level of globalisation of business and, perhaps most importantly, the role of the state have changed enormously since medieval times and cannot truly be compared to the settings of the Middle Ages.[1216] Therefore, whilst having similar ideas at its core, the modern *lex mercatoria* is quite different from its medieval predecessor and any comparisons without due regard to the changed circumstances make little sense.[1217]

One of the important findings of this study is the interdependence and mutual co-existence of the modern law merchant and national law, whose symbiotic relationship results in a more

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[1209] Such as the existence of *lex magica* in the community of magicians, see Guilhelm (n 374).

[1210] See examples of the diamond industry and tuna market in Bernstein (n 374) and Feldman (n 374) respectively. Whilst none of the abovementioned authors have explicitly expressed the view of the existence of a separate transnational legal regime for these industries and have rather explored them in order to show examples of successful functioning of closed private regimes wherein participants do not rely on state enforcement powers, any attempts to conclude for a separate branch of the modern *lex mercatoria* on the basis of the findings of Bernstein and Feldman should be challenged.

[1211] See, for example, Wethmar-Lemmer (n 1) 183-186: "[...] it may be said with certainty that, as long as international commerce exists, the *lex mercatoria* will exist", and Howarth (n 72) 60: "[...] there is now little uncertainty regarding validity of *Lex mercatoria* as the substantive law in international commercial arbitration." See also Cuniberti (n 23) 380; Berger (n 21), 293; Ole Lando, 'The Law Applicable to the Merits of the Dispute' (n 96); Gaillard, 'Transnational Law' (n 79).

[1212] See discussions in, for example, Flanagan (n 107); Celia Wasserstein Fassberg, '*Lex Mercatoria*-Hoist with Its Own Petard?' (2005) 5 Chicago Journal of International Law 21; Michaels, 'The True *Lex Mercatoria*' (n 1); Delaume (n 106); Highet (n 84); Turley (n 23); See also the critique of such academic inquiries as expressed in Janet Levit, 'Bottom-Up Lawmaking: The Private Origins of Transnational Law' (2008) 15 Indiana Journal of Global Legal Studies 49, 57.

[1213] See, for example, Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (n 39) 413; Dalhuisen, 'Legal Orders and Their Manifestation' (n 91); Khalil (n 112).

[1214] De Jesús (n 241); Medwig (n 15).

[1215] The same point is made by Ciurtin (n 2) 123-125; Sauptelli (n 14) 3-5.

[1216] See discussion in Michaels, 'Response Legal Medievalism in *Lex Mercatoria* Scholarship' (n 31) 265-267; Khademan (n 163) 314.

[1217] Volckart and Mangels (n 1); Trakman (n 68); Mark Rosen, 'Do Codification and Private International Law Leave Room for a New Law Merchant?' (2004) 5 (1) Chicago Journal of International Law 83.

efficient regulatory framework. Thus, whilst arguing as to the ineffectiveness of the discussion about which body should prevail in the regulation of commercial activities, I strongly believe that the question of finding the correct correlation between national law and the modern *lex mercatoria* is of crucial importance. Further analysis and comprehensive understanding of this development is required. Moreover, I would argue that this is a necessity for all scholars interested in international commercial law regulation and its development as it seems that this is the direction, *i.e.* a combination of state and non-state regulation, under which modern commerce is progressing.

Perhaps, one of the most promising angles to look at such a development is through the perspective of the relatively recent phenomenon of industry-specialised dispute resolution. As has been shown in this thesis, the establishment of such specialised dispute resolution centres was primarily driven by the desire to achieve greater efficiency in a particular field. The extensive caseload of these sector-specific conflict resolution forums is indicative of the support rendered to them by commercial actors. Furthermore, industry-specialised dispute resolution has distinct features that provide for active engagement in the development of new regulation through the application of both national and non-national norms. Therefore, such specialised dispute resolution centres stand at the forefront of transnational commercial regulation and closer evaluation of their activities will bring new insights of significant value to the discipline.

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