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IDENTIFYING ELEMENTS OF LEX MERCATORIA IN THE SPACE DOMAIN

Abstract

Discussions of a lex mercatoria date back to medieval Europe and refer to the customs, practices and informal dispute resolution mechanisms adopted by merchants as a means of self-regulating their overseas trade. In its modern incarnations lex mercatoria has come to mean a body of law outside of or independent from state law, created and administered by and for commerce. The conceptual basis and validity of lex mercatoria, in particular its claim to autonomy from state law, has been a longstanding point of contention in legal scholarship and it is not within the scope of this paper to revisit or add to the debate. However, even without assuming the existence and validity of a fully-fledged corpus lex mercatoria, the existence of at least some transnational legal rules corresponding to the needs of international commerce is an indisputable fact (e.g. the UNIDROIT Principles). Furthermore, commercial necessity has on occasion resulted in improvisation by non-state actors to create pockets of norms, procedures and institutions in certain domains (e.g. cyberspace). We can therefore identify a possible mechanism for the creation of binding norms that supplements the established mechanisms in international and national law.

This paper shall first examine the factors that prompt merchants to 'self-govern' including: rapid growth in a transnational trade setting; new technologies or commercial activities; the absence or inefficacy of state norms and institutions and a preference for informal dispute resolution mechanisms. We then consider the presence of these factors in the space domain and look for empirical evidence that the new generation of space merchants are creating their own norms, procedures and institutions to govern their commercial activities rather than relying purely on state-based systems.

Rapid progress in the space domain has left the prevailing legal regime looking tired and incomplete. The five space treaties struggle to be reinterpreted in accordance with new private sector initiatives. National law is limited, principally responding to states' international responsibility for activities of their non-governmental entities through authorisation and supervision. When it comes to space commerce there are gaps in the existing legal regime and thus spheres of commercial uncertainty. Soft law instruments have arisen as one means of guiding conduct but essentially lacks binding force. The importance of this research is to examine whether commercial actors in the space domain are moving towards the sort of an independent mechanism for the creation of binding norms, procedures and institutions as discussed above.