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The Right to a Jury Trial in Complex Commercial Litigation: A Comparative Law Perspective

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I. INTRODUCTION

As commerce in the United States continues to evolve, businesses find themselves entangled in increasingly complex commercial litigation. Although the Seventh Amendment to the United States Constitution guarantees the right to a jury trial in civil suits,¹ some courts deny jury trial demands in complex commercial litigation. The rationale offered by these courts is that when the issues involved are beyond the competence of jurors, a jury trial would violate the litigants' due process rights, guaranteed by the Fifth Amendment to the United States Constitution.²

This Article first examines the current disagreement in United States federal courts with regard to jury trials in complex commercial litigation. Second, it discusses the origins of the jury trial in the United States legal system. Third, this Article traces the evolution of specialized commercial courts in foreign legal systems. Fourth, it considers the implications of the increasing internationalization of

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1. U.S. CONST. amend. VII. The Seventh Amendment states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

2. *Id.* amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979), *vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 444-49 (N.D. Cal. 1978), *aff'd on other grounds sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980); *In re U.S. Fin. Sec. Litig.*, 75 F.R.D. 702, 714 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976).

trade. Finally, this Article discusses Pennsylvania's proposal to establish a specialized commercial court in Pennsylvania whose jurisdiction would extend only to corporate and commercial matters, and would not provide a right to trial by jury.

This Article suggests that specialized commercial courts without juries would expedite the commercial litigation process, and would enable litigants to conduct complex litigation before judges with commercial expertise. In addition, establishing specialized commercial courts would eliminate the potentially capricious results associated with juries, which are frequently unable to comprehend the relationship between the law and complex commercial issues. Therefore, litigating complex commercial cases in specialized courts would lead to more equitable resolutions.

II. UNITED STATES COURTS ARE SPLIT ON THE RIGHT TO A JURY TRIAL IN COMPLEX COMMERCIAL LITIGATION

The Pennsylvania judicial system experienced a preview of the complex commercial issues that courts can expect to face with increasing frequency, when the landmark case of *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*³ was filed in the United States District Court for the Eastern District of Pennsylvania. Although the district court surveyed the case's infinite complexity and the litigants estimated that the trial would last a full year, the court granted a demand for a jury trial.⁴ On appeal, the Third Circuit vacated the district court ruling on the ground that the case was too complex for a trial by jury.⁵ Nine years of discovery had produced "millions of documents and over 100,000 pages of depositions."⁶ Further, the complaint alleged a conspiracy among twenty-four defendants, one hundred co-conspirators, and the Japanese government to maintain artificially low prices for Japanese electronic products over a period of approximately fifteen years.⁷ The plaintiffs sought recovery under the Sherman Act, the Clayton Act, and the Robinson-Patman Act.⁸ In addition, some of the defendants counter-claimed against the plaintiffs

3. 478 F. Supp. 889 (E.D. Pa. 1979).

4. *Id.* at 895.

5. *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d at 1069.

6. *Id.* at 1073.

7. *Zenith Radio Corp.*, 478 F. Supp. at 894.

8. *Id.* at 893-94; Sherman Act, 15 U.S.C. §§ 1, 2 (1976) (current version at 15 U.S.C. §§ 1, 2 (1988)); Clayton Act, 15 U.S.C. § 18 (1976) (current version at 15 U.S.C. § 18 (1988)); Robinson-Patman Act, 15 U.S.C. § 13a (1976) (current version at 15 U.S.C. § 13a (1988)).

and thirty alleged co-conspirators for violations of the Lanham Act, the Sherman Act, and the Robinson-Patman Act.⁹

United States federal courts are split on the issue of whether the right to a jury trial should be upheld regardless of the complexity of civil litigation. Several federal courts have either remanded for further clarification on the issue of complexity or denied jury demands in complex civil cases.¹⁰ Other courts, faced with cases having as much or more complexity than *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,¹¹ have upheld the right to a jury trial.¹² For example, in *In re U.S. Financial Securities Litigation*, the Southern District Court of California held that the issues of the case were too complex for a jury trial.¹³ However, the Ninth Circuit reversed the district court's decision, despite records even more voluminous than those in *Zenith Radio Corp.*¹⁴

There is currently no bright-line test by which to measure

9. *Zenith Radio Corp.*, 478 F. Supp. at 895; Lanham Act, 15 U.S.C. § 1125 (1976) (current version at 15 U.S.C. § 1125 (1988)); Sherman Act, 15 U.S.C. §§ 1, 2 (1976) (current version at 15 U.S.C. §§ 1, 2 (1988)); Robinson-Patman Act, 15 U.S.C. § 13a (1976) (current version at 15 U.S.C. § 13a (1988)).

10. See, e.g., *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd on other grounds sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re U.S. Fin. Sec. Litig.*, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976); *Rutledge v. Elec. Hose and Rubber Co.*, 511 F.2d 668 (9th Cir. 1975).

11. 478 F. Supp. 889 (E.D. Pa. 1979), *vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

12. See, e.g., *Davis-Watkins Co. v. Service Merch. Co.*, 500 F. Supp. 1244 (M.D. Tenn. 1980), *aff'd*, 686 F.2d 1190 (6th Cir. 1982); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979).

13. See *In re U.S. Fin. Sec. Litig.*, 75 F.R.D. at 705-06. *In re U.S. Financial Securities Litigation* involved five plaintiffs, in eighteen consolidated lawsuits, against over one hundred defendants. *Id.* Three years of discovery had produced over 150,000 pages of depositions and over 5,000,000 documents. *Id.* at 706-07. The trial judge anticipated that the trial would extend over two years, and was unsure whether there was a courtroom large enough to accommodate all of the attorneys, let alone the jurors and alternates. *Id.* at 715.

14. See *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979). According to the Ninth Circuit,

To consider the practical abilities and limitations of juries within the context of complex cases would necessitate an examination of the whole case. However, the Seventh Amendment right has never been made dependent upon such an examination; it has always been the nature of the issue. . . . The assumption that attorneys cannot develop and present complex cases to a jury underestimates the abilities of the bar. . . . Whether a case is tried to a jury or to a judge, the task of the attorney remains the same. The attorney must organize and assemble a complex mass of information into a form which is understandable to the uninitiated.

Id. at 426-27.

whether a case is too complex for a jury to arrive at a rational decision based on the evidence adduced at trial.¹⁵ However, the Third Circuit, in *In re Japanese Electronic Products Antitrust Litigation*, articulated three factors a court should consider when determining the complexity of a case.¹⁶ First, a court should consider the overall size of the suit, as indicated by the anticipated length of trial, the amount of evidence involved, and the number of issues that will require individual consideration.¹⁷ Second, the court should consider the conceptual difficulties of the legal issues and their factual underpinnings.¹⁸ This factor can be demonstrated by the amount of expert testimony to be submitted, as well as by the probable length and detail of jury instructions.¹⁹ Finally, the court should consider the difficulty a jury will encounter in segregating distinct aspects of the case, as indicated by the number of separately disputed issues related to a single transaction or item of proof.²⁰

III. HISTORICAL FRAMEWORK OF THE SEVENTH AMENDMENT

Courts are often reluctant to find a level of complexity that would remove a case from a jury trial, due to the significance of the Seventh Amendment's express guarantee of the right to a jury trial in civil cases—a hallmark of the United States system of justice since the birth of our nation.²¹ To understand this right, one must examine its historical roots, as derived from early common law and incorporated into the Bill of Rights.

When adopted in 1789, the United States Constitution contained

15. See *Davis-Watkins Co.*, 500 F. Supp. at 1244. "Unfortunately, no litmus-paper test exists to determine complexity. The issue is whether the case is so complex that a jury cannot make a rational decision based on the evidence adduced at trial." *Id.*

16. See *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d at 1088-89. This test is somewhat similar to the three-part test articulated by the Supreme Court in *Ross v. Bernhard*, 396 U.S. 531 (1970). The Court stated that courts could consider three factors in determining whether the legal nature of an issue in a statutorily based cause of action should be resolved by a jury trial: "[F]irst, the pre-merger [of law and equity] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Ross*, 396 U.S. at 538 n.10 (emphasis added).

17. *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d at 1088-89.

18. *Id.* at 1089.

19. *Id.*

20. *Id.*

21. U.S. CONST. amend. VII; see, e.g., *Davis-Watkins Co. v. Service Merch. Co.*, 500 F. Supp. 1244 (M.D. Tenn. 1980), *aff'd*, 686 F.2d 1190 (6th Cir. 1982); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979), *vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979).

no provision guaranteeing the right to a jury trial in civil cases, although it did guarantee the right to a jury trial in criminal cases.²² During the ratification debate on the original Constitution, many states objected to the absence of a jury trial guarantee in civil suits.²³ Consequently, the first Congress included such a provision in the Bill of Rights.²⁴ The Seventh Amendment commands that, where the common law previously provided a right to a jury trial in civil suits, that "right to trial by a jury shall be preserved."²⁵

The states' demand for civil jury trials was rooted in the historical perspectives of the colonists.²⁶ Through a bitter war, the colonists established a nation that was less than twenty years old, but carried vivid memories of the oppressive British monarchy and its appointed judges.²⁷ The colonists believed that trial by a group of peers would best protect their rights and freedoms.²⁸ Thus, in 1791, the common law guaranteed a trial by jury for civil claims, and the colonists demanded that this guarantee continue.²⁹

IV. THE EVOLUTION OF SPECIALIZED COMMERCIAL COURTS IN VARIOUS LEGAL SYSTEMS

To understand the modern controversy over the right to a jury trial in complex commercial litigation, it is helpful to examine the common law as first practiced in the royal courts of England. Such scrutiny will illustrate the vast differences between suits at common law, as litigated by the colonists, and modern complex commercial litigation, such as *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*³⁰

22. U.S. CONST. art. III, § 2, cl. 3.

23. ROBERT J. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS 133 (1988). Delegates from New York, Virginia, and Massachusetts "stirred trouble" as Madison had expected. *Id.*

24. U.S. CONST. amend. VII; Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 294-98 (1966).

25. U.S. CONST. amend. VII.

26. THE FRAMING AND RATIFICATION OF THE CONSTITUTION 277, 307, 316 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) [hereinafter THE FRAMING AND RATIFICATION]; see also Henderson, *supra* note 24, at 294-98.

27. MORGAN, *supra* note 23, at 140.

28. THE FRAMING AND RATIFICATION, *supra* note 26, at 211.

29. *Id.* at 277.

30. 478 F. Supp. 889 (E.D. Pa. 1979), *vacated sub nom. In re Japanese Elec. Prod. Anti-trust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

A. *The Evolution of Commercial Law: The Law Merchant*

The United States and most of the commonwealth nations follow the tradition of English common law.³¹ However, there is an inherent contradiction within these systems. In the seventeenth century, England unified *all* branches of law, including commercial law, into one common law.³² However, common law countries continue to use the terms "mercantile law" and "commercial law."³³ Moreover, England now has a "commercial court" whose judges are assigned based on their commercial expertise.³⁴

In contrast to modern times, an autonomous body of commercial law applied among English merchants of the Middle Ages.³⁵ This law, referred to as the "Law Merchant," was an amalgamation of many European merchant laws, and was entirely distinct from the English common law developed by royal judges.³⁶ Tradition and history account for its refinements, as the Law Merchant was born of practice, operated for merchants, by merchants.³⁷ It emphasized the importance of good faith among merchants, and established a legal rate of interest on commercial loans.³⁸ In addition, the Law Merchant formulated special rules for sales, companies, agents, and

31. See generally Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1 (1982).

32. For a discussion of England's unification of all branches of law into one common law, see *infra* notes 52-57 and accompanying text.

33. In the United States, for example, Congress drafted the Uniform Commercial Code ("U.C.C.") in 1962. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1 (3d ed. 1988). Although the U.C.C. governs business transactions involving the sale of goods in the United States, it has no independent legal authority, save in those states whose legislatures have enacted it into law. *Id.*

34. MARY A. GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 188 (1982). This court is known as the Restrictive Practices Court. Professional British judges share the bench with ten laymen who are experts in industry, commerce, and public affairs. However, this court does not share the respect the English bar accords its ordinary courts. *Id.*

35. LEON E. TRACKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 23 (1983).

36. *Id.* at 7-12. The "Law Merchant" is also referred to as *Lex Mercatoria*. *Id.* at 8. For a general discussion of the Law Merchant, see TRACKMAN, *supra* note 35; ROBERT S. LOPEZ & IRVING W. RAYMOND, MEDIEVAL TRADE AND THE MEDITERRANEAN WORLD (1968); Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978).

37. Denis Tallon, *Civil Law and Commercial Law*, in 8 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 2, at 8 (Konrad Zweigert ed., 1983).

38. TRACKMAN, *supra* note 35, at 10. "[T]he rule governing the performance of agreements was quite straight-forward—merchants were obliged to observe their commitments. Good faith was the essence of the mercantile agreement. Reciprocity and the threat of business sanctions compelled performance." *Id.*

the rescission of contracts.³⁹

Under the Law Merchant, commercial disputes were settled in specialized courts, separate from the royal courts of England.⁴⁰ Two commercial court systems developed, each with jurisdiction over specific commercial transactions.⁴¹ One system evolved in the merchant towns of Italy and the ports of Flanders, now part of Belgium, where laws governing trade guilds and corporations were integrated into the municipal codes.⁴² The second system was governed by trading fair customs, and gave rise to institutions such as bills of exchange and bankruptcy.⁴³ The jurisdiction of these merchant courts was initially limited to commercial transactions among merchants, but was later extended to include transactions among non-merchants.⁴⁴

B. *The Demise of the Law Merchant*

In the seventeenth century, the Law Merchant underwent dramatic changes, as public authorities sought to bring it under public supervision.⁴⁵ This “nationalization” and codification of commercial law spread from country to country, as governments increasingly intervened in trade.⁴⁶ With its codification, the Law Merchant was no longer the law of merchants, based on subjective criteria, but became the law governing all commercial transactions, based on objective criteria.⁴⁷

England dismantled its merchant law system by a two-stage process, beginning with the royal court’s absorption of the English merchant court.⁴⁸ At best, merchants faced many difficulties in operating under the new rules of the royal court. First, they had to establish their status as merchants.⁴⁹ Next, merchants had to prove

39. *Id.* at 10-12.

40. *Id.* at 24-25.

41. WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 50-51, 80 (1963).

42. *Id.*

43. *Id.* This body of law is often referred to as *jus nundinarum*. Tallon, *supra* note 37, at 8.

44. Tallon, *supra* note 37, at 8.

45. *Id.*

46. *Id.* at 9.

47. *Id.*

48. *Id.* at 8. The second stage of England’s dismantlement of the Law Merchant occurred under the influence of Lord Mansfield. *Id.* For a more detailed discussion of this unification, see *infra* notes 52-57 and accompanying text.

49. TRACKMAN, *supra* note 35, at 26-27.

specific commercial customs in England.⁵⁰ This posed additional problems for merchant litigants, as typical English jurors were not equipped, educationally or socially, to understand commercial customs. Further, because royal judges were unfamiliar with the specialized area of commercial law, they were of little help charging jurors with instructions.⁵¹

As English law fell into further disarray, Lord Mansfield, the Lord Chief Justice from 1756 to 1786, intervened.⁵² Lord Mansfield created a cohesive body of law, which greatly simplified the task of royal judges.⁵³ First, Lord Mansfield adopted rules of commercial law applicable to everyone, not just merchants.⁵⁴ Second, he established a procedure whereby special juries, comprised of London merchants, would apply the customary commercial rules and render the requisite findings.⁵⁵ These findings were then integrated into the common law.⁵⁶ Once England adopted Lord Mansfield's innovations, the Law Merchant disappeared as an independent commercial law.⁵⁷ With its disappearance, commercial law lost its international character, its flexibility, and its adaptability.

The United States common law, adopted from English common law, is an attempt to harmonize two systems of law.⁵⁸ The English common law's absorption of merchant law was simply an historical accident, never logically conceived or executed.⁵⁹ With a similar lack of logic, United States courts continue to memorialize this accident of law. Ironically, today in England and in all civil law countries, there

50. *Id.*

51. *Id.* The merchants' concerns about their fates being decided at the hands of these juries are as relevant today as they were in the seventeenth century. In fact, these concerns could have been voiced in the Pennsylvania courtroom where *Zenith Radio Corp. v. Matsushita Electric Industrial Co.* clashed resoundingly. 478 F. Supp. 889 (E.D. Pa. 1979), *vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

52. TRACKMAN, *supra* note 35, at 27-28.

53. *Id.* For a general discussion of Lord Mansfield's effect on the codification of commercial law, see Mitchell, *supra* note 41, at 77-78, 107, 161; Jane Giddings, *Lord Mansfield: A Biography of William Murray, First Earl of Mansfield 1705-1793, Lord Chief Justice for Thirty-Two Years*, 102 L.Q. REV. 638 (1986) (book reviews); Derrick Owles, *Lord Mansfield*, 135 NEW L.J. 1134 (1985) (book reviews).

54. TRACKMAN, *supra* note 35, at 27-28.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See generally* Kirst, *supra* note 31, at 1.

59. *Id.*

are no jury trials for civil actions.⁶⁰ Therefore, the United States stands alone among these countries in its guarantee of a jury trial for commercial litigation.⁶¹

C. The English Writ System

In 1791, England had three major common law courts: Exchequer, Common Pleas, and King's Bench.⁶² The Court of Chancery, from which the Delaware Chancery Court derives its name, was England's principal court of equity.⁶³ As is true of many legal structures, these courts were not created through one grand monarchical gesture, nor even through a structured process. Rather, they evolved over many centuries to meet emerging legal needs and, no doubt, to enhance the political aspirations of court officers.⁶⁴ Each court grew with the increased specialization of these officers of the King.⁶⁵ However, the degree of development varied among the courts.⁶⁶ And, since each court developed at a different pace, most court procedures also varied.⁶⁷

Although there were a variety of English court procedures, all courts employed the "writ system."⁶⁸ Originally, the writ was a royal order to perform some duty, such as redress a wrong or appear before

60. Ruggero J. Aldisert, *Rambling through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 982 (1982).

61. *Id.*

62. Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1572 (1983). The Court of Exchequer was concerned with cases affecting the royal revenue and possessed a limited civil jurisdiction. The Court of King's Bench had jurisdiction to issue the prerogative writs of mandamus, prohibition, and certiorari. Finally, the Court of Common Pleas heard civil cases brought by one individual against another. RONALD J. WALKER, *THE ENGLISH LEGAL SYSTEM* 7-9 (6th ed. 1985).

63. Devlin, *supra* note 62, at 1590-91. The Court of Chancery was later added to the three royal courts. WALKER, *supra* note 62, at 14; see also *infra* notes 74-75 and accompanying text.

64. WALKER, *supra* note 62, at 9; see also William Bassett, *Exploring the Origins of the Western Legal Tradition*, 85 COLUM. L. REV. 1573-84 (1985).

65. WALKER, *supra* note 62, at 14.

66. *Id.* at 43. For example, until the fourteenth century, common law judges, especially those of the Court of Exchequer, could exercise some discretion in the application of the law. However, as the writ system solidified, such discretion disappeared. *Id.* For a discussion of the English writ system, see *infra* notes 68-73 and accompanying text.

67. *Id.* at 4-5.

68. *Id.* at 7-8. The Court of Exchequer exercised jurisdiction through the writs of debt and covenant. The Court of Common Pleas exercised jurisdiction over personal actions of debt, covenant, and detinue. The Court of King's Bench used the writ of *latitat et discurrit* ("arrest the defendant wherever he 'lurks and runs'"). *Id.*

the court.⁶⁹ Eventually, it evolved into the method by which an individual could initiate a lawsuit, similar to the complaint commonly used in the United States.⁷⁰ However, because the writ's original purpose was to command the performance of a specific action, it severely limited the subject matter of a lawsuit.⁷¹ If the cause of action could not fit into the writ language, the plaintiff was entitled to no legal recourse, as the writ could be neither amended nor combined with another writ.⁷² Together, these restrictions reduced all common law suits to a few related issues, narrowly defined by the writ of choice.⁷³ To remedy this problem, the English justice system developed a chancery court to address cases for which remedies at law were inadequate.⁷⁴ With the development of this new court, a plaintiff could bring suit in England's Court of Chancery any time a cause of action did not fit under the language of a writ.⁷⁵

D. *Legal and Equitable Remedies in the United States*

Like England, the United States adopted a dual court system that provided separate forums for actions seeking legal remedies and those seeking equitable remedies.⁷⁶ This dichotomy continued until 1938, when Congress merged the federal courts under the Federal Rules of Civil Procedure.⁷⁷ Today, enforcing the distinction between equitable and legal remedies results in irrational applications of the Seventh Amendment's jury trial guarantee. For example, in *Curtis v. Loether*,⁷⁸ the Supreme Court recognized Congress' power "to entrust enforcement of statutory rights to . . . [a] specialized court of equity

69. *Id.*

70. WALKER, *supra* note 62, at 28; see also FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 10 (1985).

71. *Id.* at 42.

72. *Id.* at 43.

73. *Id.* at 31.

74. FREDERIC W. MAITLAND, EQUITY 5-7 (2d ed. 1936).

75. WALKER, *supra* note 62, at 55.

76. JAMES & HAZARD, *supra* note 70, at 17. When Congress created the federal court system in 1789, it created a single system that administered law and equity separately. *Id.*

77. *Id.* at 18. The Enabling Act of 1934 (current version at 28 U.S.C. § 2072 (Supp. 1991)) granted the Supreme Court the power to prescribe forms of process, writs, pleadings, and motions, as well as the power to dictate the practices of the district courts and courts of appeal. *Id.*

Congress enacted the Federal Rules of Civil Procedure on September 16, 1938. Two principal features were the unification of law and equity courts, and the retention of jury trials in actions formerly "at law." *Id.*

78. 415 U.S. 189 (1974).

free from the strictures of the Seventh Amendment.”⁷⁹ However, although prior cases held that the federal bankruptcy court is such a “specialized court of equity,” the Supreme Court, in *Granfinanciera, S.A. v. Nordberg*,⁸⁰ ignored the relevancy of the forum that Congress designated to hear bankruptcy claims.⁸¹ Instead, the Court focused solely on the “legal” nature of the petitioner’s claim, and held that a party to a bankruptcy proceeding, a suit in equity, has a Seventh Amendment right to a trial by jury.⁸² In a strong dissent, Justice White argued that juries would be disruptive in bankruptcy proceedings, would “unravel the statutory scheme established by Congress,” and would contradict prior court rulings.⁸³ Justice White pointed out that the right to a trial by jury is determined not only by the nature of the claim, but also by the choice of forum.⁸⁴ For instance, the Supreme Court has held that the Seventh Amendment does not apply when a “suit at common law” is heard in state court,⁸⁵ and does not apply in federal administrative proceedings.⁸⁶ In fact, courts often consider the character of the federal forum in which the claim will be heard to determine if the Seventh Amendment’s guarantee of a jury trial applies.⁸⁷

Frozen within the Seventh Amendment, this distinction between equitable and legal remedies goes to the heart of the controversy over complex commercial litigation and the right to a jury trial.⁸⁸ The Seventh Amendment was drafted in 1791, and the United States has grown exponentially since that time.⁸⁹ Today, cases often involve millions of documents, but United States courts continue to apply a jury trial standard developed during an agrarian and unindustrialized

79. *Id.* at 195. In *Curtis v. Loether*, the Supreme Court held that the Seventh Amendment entitled either party, on demand, to a jury trial in actions for damages under the fair housing provision of the 1968 Civil Rights Act. *Id.* at 191.

80. 492 U.S. 33 (1989).

81. *Id.* at 64.

82. *Id.*

83. *Id.* at 83 (White, J., dissenting).

84. *Id.* In his dissent, Justice White asked the majority, “Just where *are* the petitioners going to obtain the jury trial to which the Court deems them entitled?” *Id.* (emphasis added).

85. See *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916).

86. See *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987).

87. *Granfinanciera, S.A.*, 492 U.S. at 79 (White, J., dissenting).

88. See, e.g., *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107 (Fed. Cir. 1985) (addressing complex patent infringement issues).

89. Stephen Adler, *Can Juries Do Justice to Complex Suits?*, WALL ST. J., Dec. 21, 1989, § 2, at 1.

era.⁹⁰ During that era, the average jury faced a simple and limited set of issues, and procedural devices eliminated the possibility of complex litigation ever reaching them.⁹¹ A trial of more than a day was extraordinary.⁹² This is in strong contrast to the anticipated two year trial the Ninth Circuit required a jury to endure in *In re U.S. Financial Securities Litigation*,⁹³ and the one year jury trial consumed by *Zenith Radio Corp.*⁹⁴

Beyond doubt, applying the Seventh Amendment by such rote recital of old common law causes tension and inconsistency among federal courts. Just as the English writ system became obsolete due to its rigidity, so too may the Seventh Amendment's jury trial guarantee, if applied without regard to its fitness for the issues at hand.

E. Modern Commercial Autonomy in Foreign Legal Systems

Today, only the Romano-German legal systems recognize the autonomy of commercial law, as signified by the existence of a commercial code.⁹⁵ The three principle commercial codes of Europe are the French Commercial Code of 1807,⁹⁶ the Spanish Commercial Code of 1885,⁹⁷ and the German Commercial Code of 1900.⁹⁸ France was the stabilizing influence in Europe that insured the dichotomy between civil and commercial law would survive both codification and the centralization of justice.⁹⁹ In its Commercial Code of 1807, France established separate commercial courts within its first level of jurisdiction, the Tribunal de Commerce.¹⁰⁰ Most other civil law

90. *Id.*

91. Devlin, *supra* note 62, at 1573.

92. *Id.*

93. 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979).

94. 478 F. Supp. at 889.

95. Tallon, *supra* note 37, at 10. According to Professor Denis Tallon of the University of Law, Economics and Social Sciences of Paris, the autonomy of commercial law is "always confirmed by the existence of a commercial code." *Id.* However, many of these codes serve more as symbols than as the primary source of rules governing commerce. *Id.*

96. Dalloz, Code de commerce [C. COM.], translated in GEORGE A. BERMANN ET AL., FRENCH LAW: CONSTITUTION AND SELECTED LEGISLATION ch. 5 (1990) [hereinafter COMMERCIAL CODE OF FRANCE].

97. Código de Comercio [C.COM.], translated in FERNANDO POMBO, DOING BUSINESS IN SPAIN (1987) [hereinafter COMMERCIAL CODE OF SPAIN].

98. Handelsgesetzbuch [HGB], translated in BUSINESS TRANSACTIONS IN GERMANY app. 2 (Bernd Ruster ed., 1991) [hereinafter COMMERCIAL CODE OF GERMANY]; Tallon, *supra* note 37, at 10.

99. Tallon, *supra* note 37, at 10.

100. COMMERCIAL CODE OF FRANCE, *supra* note 96; Tallon, *supra* note 37, at 10.

countries followed suit.¹⁰¹

The principle differences among European commercial codes may stem from their varying criteria for applicability. For example, the German Commercial Code adopts a subjective criterion, as it applies only to merchants and those practicing commerce.¹⁰² In other words, it is a law that applies only to a designated professional class, over which the German commercial courts always have jurisdiction.¹⁰³ In contrast, the Spanish Commercial Code employs an objective criterion, focusing primarily on the commercial activities involved.¹⁰⁴ The Spanish Commercial Code regulates certain transactions categorized as "commercial," and consists primarily of rules governing such transactions.¹⁰⁵ The identity or professional class of the parties is irrelevant.¹⁰⁶ Rather, Spanish commercial courts have jurisdiction to examine all cases relating to commerce, without distinction as to merchant and non-merchant participants.¹⁰⁷

The model for a mixed system is the French Commercial Code.¹⁰⁸ Although early French common law leaned toward a subjective criterion, by focusing on the class of participants involved in a transaction, the French Commercial Code was strongly influenced by the French Revolution of 1787.¹⁰⁹ To implement its post-revolutionary principles of citizen equality and freedom of trade, France suppressed the privileges of its nobility.¹¹⁰ However, France retained its commercial courts, despite pervasive hostility toward specialized courts.¹¹¹

It is also important to consider the Japanese justice system, as Japanese litigants bring many issues of complex litigation to United States courts.¹¹² Japan's justice system is unique, because it combines

101. Tallon, *supra* note 37, at 10.

102. COMMERCIAL CODE OF GERMANY, *supra* note 98, art. 1; Tallon, *supra* note 37, at 14.

103. Tallon, *supra* note 37, at 14.

104. COMMERCIAL CODE OF SPAIN, *supra* note 97, art. 2; Tallon, *supra* note 37, at 21.

105. COMMERCIAL CODE OF SPAIN, *supra* note 97, art. 2; Tallon, *supra* note 37, at 21.

106. Tallon, *supra* note 37, at 21.

107. *Id.*

108. COMMERCIAL CODE OF FRANCE, *supra* note 96.

109. Tallon, *supra* note 37, at 11.

110. *Id.*

111. *Id.*

112. *See, e.g.,* Royal Coast Dev. Corp. v. Chalon Corp., No. 89-C00037, 1990 U.S. Dist. LEXIS 18658 (D. Haw. June 12, 1990); Nippon Emo-Trans Co., Ltd. v. Emo-Trans, Inc., 744 F. Supp. 1215 (E.D.N.Y. 1990); Yamaha Corp. of Am. v. United States, 745 F. Supp. 734 (D.D.C. 1990).

both French and German law, with an overlay of United States reforms.¹¹³ Although Japan's private law was initially influenced by French law, Japan's first commercial code, adopted in 1890, was based on the German Commercial Code.¹¹⁴ After World War II, the United States government exerted pressure on Japan to amend its commercial law, and Japan acquiesced.¹¹⁵ Since 1947, Japan has introduced legislation on monopolies, competition, and the abuse of power, all of which were influenced by United States models.¹¹⁶ Japan, like the United States, has no specific commercial court.¹¹⁷

V. IMPLICATIONS OF THE INTERNATIONALIZATION OF TRADE

The greatest impetus for modifying complex commercial litigation procedures in the United States is the increasing internationalization of economic relationships. In 1992, the European Economic Community ("EC") will become an economic reality, and Europe will stand as a single, powerful economic force.¹¹⁸ When this happens, non-European corporations will no longer regard choice-of-forum courts, such as the International Chamber of Commerce, as truly neutral.¹¹⁹ Thus, the proposed Pennsylvania Courts of Special Chancery may be one of the few tribunals in the world offering neutrality, judicial expertise, and the expeditious resolution of international mercantile disputes.¹²⁰

In response to the need for a neutral international court, a unified legal system may someday develop. This system would likely begin by addressing elements of commercial law within a federal state, such as Germany or the United States; a regional union, such as Benelux; a

113. Tallon, *supra* note 37, at 40. For a general discussion of the Japanese legal system, see Takeshi Kojima, *Civil Procedure Reform in Japan*, 11 MICH. J. INT'L L. 1218 (1990); Michael P. Waxman, *The Japanese Legal System: Myth and Reality*, 81 WIS. B. BULL. 27 (1988); Donald L. Uchtmann et al., *The Developing Japanese Legal System: Growth and Change in the Modern Era*, 23 GONZ. L. REV. 349 (1988).

114. Tallon, *supra* note 37, at 40.

115. *Id.*

116. *Id.*; see also Kenji Sanekata, *Antitrust in Japan: Recent Trends and their Socio-Political Background*, U. BRIT. COLUM. L. REV. 379 (1986); Akinori Uesugi, *Japanese Antimonopoly Policy: Its Past and Future*, 50 ANTITRUST L.J. 709 (1982).

117. Tallon, *supra* note 37, at 40.

118. See Gordon Slynn, *Aspects of the European Economic Community*, 18 CORNELL INT'L L.J. 1 (1985); Derrick Wyall, *New Legal Order, or Old?*, 7 EUR. L. REV. 147 (1982).

119. Tallon, *supra* note 37, at 36.

120. For a discussion of Pennsylvania's proposed Courts of Special Chancery, see *infra* notes 127-41 and accompanying text.

supranational institution, such as the EC; or on a worldwide scale.¹²¹ In their attempt to unify, the entities involved will certainly detach the law of international economic relations from any national control.¹²² The EC demonstrated this truism in a 1964 landmark case, *Costa v. ENEL*,¹²³ which announced that EC law takes precedence over national law, including national constitutional law.¹²⁴ The basic law of the EC is the 1957 Treaty of Rome, with the European Court of Justice responsible for the Treaty's implementation.¹²⁵ As evidence of the far-reaching impact of a unified legal system, the EC's supremacy doctrine, announced by a court without a country and with few independent enforcement powers, was accepted by all six of the original EC member nations.¹²⁶

VI. THE PENNSYLVANIA PROPOSED COURTS OF SPECIAL CHANCERY

On September 10, 1990, a bill was introduced in the Pennsylvania State Senate, proposing the establishment of specialized courts to deal only with corporate and commercial issues.¹²⁷ These Pennsylvania Courts of Special Chancery would be patterned somewhat after the Delaware Court of Chancery.¹²⁸ The Delaware court—the only one of its kind in the United States—hears disputes concerning solely corporate association matters, such as hostile takeovers and shareholder suits.¹²⁹ The remedies available in the Dela-

121. Tallon, *supra* note 37, at 10.

122. *Id.*

123. 3 C.M.L.R. 425 (1964) (Italy), reprinted in MAURO CAPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 117 (1979).

124. *Id.* at 593.

125. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, reprinted in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* 173 (1973).

126. CAPELLETTI & COHEN, *supra* note 123, at 116.

127. Chancery Courts Act, S. Bill 1170, 1990 Sess., 1990 Pa. Gen. Ass. This bill was reintroduced to the Pennsylvania State Senate on March 11, 1991, at S. Bill 777, 1991 Sess., 1991 Pa. Gen. Ass. 822. See also Milo Geyelin, *Pennsylvania Lawmakers to Consider Specialized Court for Business Matters*, WALL ST. J., Sept. 11, 1990, at A3.

As it now stands, the judicial power in Pennsylvania is vested in a unified judicial system. Those with jurisdiction over civil litigation are the Courts of Common Pleas, the Commonwealth Court, the Superior Court, and the Supreme Court. The Courts of Common Pleas have local, not statewide, jurisdiction. The Commonwealth Court deals with issues unique to the commonwealth, and the Superior and Supreme Courts function as the appellate courts. 42 PA. STAT. ANN. §§ 301-934 (1988).

128. Geyelin, *supra* note 127, at A3.

129. DEL. CONST. art. IV, § 1 (amended 1951). One highly publicized case which originated in the Delaware Court of Chancery is *Unocal Corp. v. Mesa Petroleum*, 493 A.2d

ware Court of Chancery are purely equitable; namely, court orders and injunctions.¹³⁰

In contrast to the Delaware Court of Chancery, the Pennsylvania bill proposes a court with exclusive jurisdiction not only over corporate equity matters, but also over suits claiming damages in commercial disputes where the contested amount exceeds \$500,000.¹³¹ The litigants would not be entitled to a jury trial; rather, they would appear before an appointed judge who specializes in business law.¹³² This controversial provision would require the Pennsylvania legislature to amend Pennsylvania's Constitution with regard to its guarantee of a trial by jury.¹³³

Delaware's experience with its chancery court epitomizes the benefits of specialized commercial courts. In fact, the Delaware Court of Chancery is cited as the primary reason why nearly half of all companies listed on the New York Stock Exchange ("NYSE") are incorporated in Delaware.¹³⁴

Interestingly, Pennsylvania—presently home to only four percent of the NYSE members—is the vanguard of business advancements.¹³⁵ For example, in 1953, Pennsylvania became the first state in the country to adopt the Uniform Commercial Code,¹³⁶ and in 1990, Pennsylvania passed the toughest anti-takeover law in the nation.¹³⁷ Delaware's successful Court of Chancery highlights the importance of

946 (1985) (Unocal made a self-tender for its own shares which excluded from participation T. Boone Pickens, the stockholder who made a hostile tender offer).

130. DEL. CONST. art. IV, § 1 (amended 1951); Geyelin, *supra* note 127, at A3.

131. Chancery Courts Act, *supra* note 127; PENNSYLVANIA GENERAL ASSEMBLY, DISCUSSION PAPER CONCERNING PROPOSED COURTS OF SPECIAL CHANCERY (Aug. 30, 1991) [hereinafter DISCUSSION PAPER].

132. DISCUSSION PAPER, *supra* note 131, at 5.

133. Chancery Courts Act, *supra* note 127, div. III, § 301. As it currently reads, the Pennsylvania Constitution requires: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." PA. CONST. art. I, § 6.

134. Geyelin, *supra* note 127, at A3.

135. *Id.*

136. 12A PA. CONS. STAT. ANN. §§ 1-101 to 10-104 (1953). The Pennsylvania legislature repealed this Uniform Commercial Code in 1980. 13 PA. CONS. STAT. ANN. § 1 (1980).

137. 1990 Pa. Laws 36; 1990 Pa. Legis. Serv. 36 (Purdon). This law amends Title 15 (Corporations and Unincorporated Associations) of the Pennsylvania Consolidated Statutes. It clarifies the fiduciary obligations of directors of corporations and other associations; clarifies certain definitions; adds provisions relating to control-share acquisitions; and provides for disgorgement by certain controlling shareholders, following attempts to acquire control of certain corporations, of severance compensation for employees terminated following such control-share acquisitions. Vineeta Anand, *Pennsylvania Anti-Takeover Law Slams Stock Prices, Study Finds*, INVESTOR DAILY, Oct. 1, 1990, at 31; *see also* Geyelin, *supra* note 127, at A3.

Pennsylvania's establishment of a business court to attract corporate enterprises.¹³⁸

The Philadelphia Bar Association and the Pennsylvania Business Roundtable, an association of business executives from forty-two of the state's largest corporations, both support the Pennsylvania bill proposing Courts of Special Chancery.¹³⁹ They claim the bill's primary benefit is the expeditious judicial review of corporate legal matters:¹⁴⁰ the average civil suit, with its right to a jury trial, currently takes five years to work its way through the Philadelphia Court of Common Pleas.¹⁴¹

Furthermore, the Seventh Amendment would not operate to defeat the proposed Pennsylvania legislation. The Supreme Court has consistently held that the Seventh Amendment is not applicable to state court proceedings.¹⁴² On the other hand, the language in Pennsylvania's constitution guarantees the right to a jury trial in civil cases. However, if the rationale for using a jury is to ensure fairness, Pennsylvania's proposed commercial court provides an adequate substitute. The question raised by demands for jury trials in complex commercial litigation cases is generally whether the jury will understand the issues involved.¹⁴³ By instituting a specialized court to hear complex commercial cases, the complexity of such cases becomes a non-issue and the parties are assured that they will receive fair trials conducted by competent judges who are able to comprehend the issues presented.

VII. CONCLUSION

This Article has traced the evolution of the Seventh Amendment's jury trial guarantee through the United States legal system. In

138. Geyelin, *supra* note 127, at A3.

139. *Id.*

140. Michael W. Armstrong, *A Court For Business in the State?*, PHILA. BUS. J., Sept. 17, 1990, § 1, at 1.

141. Geyelin, *supra* note 127, at A3.

142. *Minneapolis and St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916). The possibility of excluding juries from resolving complex issues has resulted in numerous articles concerning the applicability of the Seventh Amendment to such cases. See generally Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Morris S. Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980); James S. Campbell & Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 43 COLUM. L. REV. 80 (1980).

143. *In Re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1090 (3d Cir. 1980).

doing so, this Article has noted the inconsistencies and incongruities of legal decisions rendered under a rigid application of the Seventh Amendment. Pennsylvania's proposed unjuried Court of Special Chancery, with its pragmatic solution to the limitations of modern courts, enables this Article to present a comparative analysis of the right to a jury trial in complex commercial litigation.

The law has come full circle. Pennsylvania's proposed commercial court is a renaissance of the Law Merchant, as is the establishment of an international system of commercial law. The foundation of the commercial court is based on the freedom of contract—the fundamental principle of international order. It relies on international rules of mercantile conduct, independent of national legal systems.¹⁴⁴

A coherent system of addressing international commercial disputes must be developed as countries continue to seek world trading outlets. No country should have the power to insist that its own laws settle these disputes. The legal systems of the world are simply too diverse. In particular, the United States stands alone among most countries in its guarantee of jury trials in civil actions.¹⁴⁵ Any insistence by the United States that this standard for commercial disputes be employed among multinational corporations is purely anachronistic.

144. Tallon, *supra* note 37, at 2-18.

145. Aldisert, *supra* note 60, at 982.