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Research Article

LEGAL ISSUES CONCERNING THE APPLICATION OF THE LEX MERCATORIA IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

This particular paper attempts to outline the specific problems in the application of lex mercatoria in international commercial arbitration and suggests the way how the legislation of Uzbekistan should navigate in the existence of those problems in order to ensure its attractiveness as the seat of arbitration. The structure of the article is as follows. It first describes the historical evolution of the lex mercatoria until it finds its place in international commercial arbitration and later is mentioned in a number of international instruments, and more importantly, is implemented in the national laws consequently. The article then addresses modern sources of the lex mercatoria and specifically mentions the elements of lex mercatoria in the legislation of Uzbekistan. The paper also addresses the consequences such as setting aside the awards which were issued applying lex mercatoria. The paper concludes with the proposals of the author concerning the adaptation of Uzbekistan to the above-mentioned problems in the application of lex mercatoria.

KEYWORDS

Lex mercatoria, applicable law, annulment of awards.

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INTRODUCTION

There are numerous approaches on the question of how long before the emergence of lex mercatoria started to exist regardless of its different nature and names. The common approach which suits most of the approaches is that the existence of lex mercatoria should be divided into three periods: ancient, medieval and modern lex mercatoria.

A number of scholars strongly believe that the roots of lex mercatoria come from the ancient period of the Roman Empire. It is suggested that there was a separate existence of ius gentium from the ius civile, which are aimed to regulate the relations between the citizens and the laws regulating the relations between citizens and non-citizens in the Roman Empire.[1] Ius civile was created and codified by state while ius gentium based on the precedents of practice between the commercial actors of society, thus had developed independently from the state control. However, from the beginning of 3th century the significance of ius gentium lowered as all the residents of the empire had been granted citizenship[2].

Although the opponents of lex mercatoria believe that lex mercatoria has nor ancient and medieval roots,[3] it is a widely confirmed concept that the most significant history of it relates to the medieval age. After the collapse of the Roman Empire, the concern to keep commercial transactions safe led to the integration of merchants in guilds which later created their own commercial rules.[4]

Medieval national laws could not satisfy the needs of merchants and guilds as they lacked the norms regulating international commercial transactions. Therefore, the commercial rules of guilds played a significant role in deciding disputes between the member-merchants within the guild. These commercial rules were applied and enforced by the guilds themselves by influencing the member-merchants, for example by removing the member from the guild.[5]

It should be stated that the disputes between the merchants and non-merchants were settled by feudal laws, although they were not suitable for the commercial character of disputes. Later on, in the period of city-states, attention to merchants increased and the city-states tried to attract more merchants by establishing fascinating dispute settlement methods, which took a shorter period of time and the decision could not be overturned.[6] They included Piepowder Courts and Staple Courts in England where disputes were resolved by an arbitrator who was familiar with trade usages and practice[7].

Albrecht Cordes suggest to divide the fields of medieval lex mercatoria into the following groups:

[1] Baddack, F. (2005). *Lex mercatoria: scope and application of the Law Merchant in arbitration* (Doctoral dissertation, University of the Western Cape) 6.
[2] Baddack, F. (2005). *Lex mercatoria: scope and application of the Law Merchant in arbitration* (Doctoral dissertation, University of the Western Cape) 6.
[3] Keli-Georgiou, I. (2016) Lex mercatoria: an unsettled concept. available at: https://www.researchgate.net/ 3.
[4] Güçer, S. (2009). Lex Mercatoria in International Arbitration. *Ankara Bar Review*, 2(1), 32
[5] Güçer, S. (2009). Lex Mercatoria in International Arbitration. *Ankara Bar Review*, 2(1), 32.
[6] Güçer, S. (2009). Lex Mercatoria in International Arbitration. *Ankara Bar Review*, 2(1), 33.
[7] Baddack, F. (2005). *Lex mercatoria: scope and application of the Law Merchant in arbitration* (Doctoral dissertation, University of the Western Cape) 9-10.

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procedural law of market courts;

internal merchant law;

external merchant law.[8]

The above-mentioned "attractive" legal order established by city-states around the 10th century belongs to the first field of merchant law. The laws within the guilds and customs specifically relating to merchants within a state fall to the second field of merchant law. The third field, external merchant law, involved the rules concerning the international transactions within the commercial actors of different states.

Also the states tried to adjust to the development of trade relations, all they could do for commercial actors of society was contributing to the procedural law of market courts, however the other two fields of merchant law were still developing without any involvement of states. At the peak of international trade relations there were a number of elements of commercial trade practice, including Rolls of Oleron (maritime judgements), Laws of Wisby, Westcapelle and Consulate del Mare (maritime transport usages in trade).[9]

It should be mentioned that the function of medieval lex mercatoria was different than that of today, as the medieval lex mercatoria filled in the gaps of national laws of that time while the modern lex mercatoria exists parallelly with national laws.[10]

Professor Berger mentions that the rebirth of idea of lex mercatoria relates to the works of Berthold Goldman who has referred to "new lex mercatoria" in an article devoted to the legal status of the Suez Canal Company, where it has described the company to have a transnational character regardless of its territorial relevance.[11]

In contrast to the old one, the circumstances for the creation of modern lex mercatoria was unwillingness of the participants of trade communities to follow the commercial rules established by states.[12] They tried as much as possible to avoid the involvement of the state in their commercial disputes. The reasons which led for this avoidance were firstly, late and inadequate reaction of states for immensely growing commercial transactions and secondly, the states tried to put their political purposes above the interests of parties of commercial transactions.

At the same time, neither the regulation of international commercial transactions with the help of international instruments and choice of law rules could satisfy the needs of commercial society as it took a significant period of time to create the version of international instruments which would be acceptable by different states with different jurisdictions.[13] At the

[8] Cordes, A. (2016). The Future of the History of Medieval Trade Law. *American Journal of Legal History*, 56(1), 17.

[9] Baddack, F. (2005). *Lex mercatoria: scope and application of the Law Merchant in arbitration* (Doctoral dissertation, University of the Western Cape) 8.

[10] Galgano, Francesco (1995) "The New Lex Mercatoria," Annual Survey of International & Comparative Law: Vol. 2: Iss. 1, Article 7, 108.

[11] Berger, Klaus Peter, Berthold Goldman, Philippe Fouchard and Philippe Kahn - The Rebirth of the Lex Mercatoria by the Dijon School available at: https://www.trans-lex.org/1 1.

[12] Galgano, Francesco (1995) "The New Lex Mercatoria," Annual Survey of International & Comparative Law: Vol. 2: Iss. 1, Article 7, 109.

[13] Алимова, Я. О. (2010). Практика международного коммерческого арбитража как источник lex

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same time with international commercial transactions, intensified investment relations also contributed to the emergence of modern lex mercatoria as the investors were not willing to apply national laws while entering into relations with governments.[14]

Modern lex mercatoria developed with arbitration at the same time as there was a common circumstances for them to flourish as the parties of disputes tried to avoid the rules of countries. At the same time, the difference among the national laws of the modern states reached its critical level, therefore there was a great concern to unify the rules of trade. As the party autonomy permitted in international commercial arbitration the actors of the commercial community searched for specific rules capable of regulating international transactions and which were sufficiently unified to avoid the legal barriers caused by the difference in legislation between jurisdictions.

As Frank Baddack provides,[15] Grossmann-Doerth first mentioned that at the same time with international commercial arbitration, autonomous laws consisting of trade usage and customs started to develop without a state involvement.[16]

As discussed above, lex mercatoria was mentioned with different terms such as the "law of merchants", "ius mercatorum", "a-national law", "transnational law", "transnational commercial law", "sub-law", "supranational law", "customary mercantile law" and so on. However, the lex mercatoria is most often mentional by scholars. The term "lex mercatoria" itself, according to many, was first noticed in Fleta laws which were written in the late 13th century in England.[17]

Similarly with its history, the ideas concerning the existence of lex mercatoria are also subject to significant discussions, on one hand, there a the group scholars supporting the today's importance of lex mercatoria as the parallel law for the national laws, while on the other hand, another group of them refute that it exists, and some of the call it an "enigma"[18].

Going on with the definition of lex mercatoria, the mostly accepted view is that lex mercatoria comprises "*public international law, certain uniform laws, general principles of law, rules of international organizations, customs and usages of international trade, standard form contracts and arbitral case law*"[19].

One of the most problematic aspects of the theory of lex mercatoria remains the uncertainty of sources containing norms that can be attributed to lex mercatoria. According to the theory, the "legal system lex mercatoria" will be distinguished by a huge variety of forms of expression of its rules. Among the sources of lex mercatoria are international conventions

mercatoria. *Актуальные проблемы российского права*, (3), 341.

[14] Elcin, M. (2012). *Lex mercatoria in international arbitration theory and practice* (Doctoral dissertation) 23.

[15] Baddack, F. (2005). *Lex mercatoria: scope and application of the Law Merchant in arbitration* (Doctoral dissertation, University of the Western Cape) 17.

[16] Grossmann-Doerth, "Der Jurist und das autonome Recht des Welthandels", Juristische Wochenschrift (1929), 3447.

[17] Volckart, O., & Mangels, A. (1999). Are the roots of the modern lex mercatoria really medieval?. *Southern economic journal*, 65(3), 443

[18] Highet, K. (1988). Enigma of the Lex Mercatoria. *Tul. L. Rev.*, 63, 613.

[19] Rivkin, D. W. (1993). Enforceability of Arbitral Awards Based on Lex Mercatoria. *Arbitration International*, 9(1), 67.

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containing unified substantive norms, model laws, generally recognized principles of law, international trade customs, trade usages, common commercial practice, arbitration awards.

When citing sources, lex mercatoria is especially frequently mentioned in documents developed by international both intergovernmental and non-governmental organizations. Among such documents are standard contracts reflecting the features of certain types of commercial relations pro forma, standardized conditions and, above all, unified rules for various forms of settlement e.g. INCOTERMS. Berger notes that the publication of the Principles of European Contract Law and the UNIDROIT Principles has changed the scene of discussions dramatically as they were the first official codifications of the lex mercatoria.

As noted, within the framework of the theory of lex mercatoria, a separate place is occupied by the position of authors who consider lex mercatoria as a method of resolving disputes using the rules established in the process of comparative legal analysis. At the same time, the followers of this board are characterized by the refusal to use the term "source", rather they suggest using the terms "element" or "instrument".

O. Lando, noting the impossibility of providing an exhaustive list, offers an approximate list of instruments in the comparative legal analysis of the elements of lex mercatoria:

a) The norms of public international law which may also be used to resolve disputes between actors of trade. An example of those norms can be the Vienna Convention on the Law of Treaties, which is comprised of the foundations of legal systems;
b) Unified laws which aim to regulate transactions in international trade;
c) General principles of law, which arbitrators can derive from even the literature;
d) Rules of international organizations, which include various kinds of resolutions, recommendations, codes of conduct affecting contractual issues - these documents are not binding, but often reflect provisions of fairness and commercial decency;
e) The customs and usages of international trade, e.g. INCOTERMS.;
f) Standard contract forms and clauses, or rather, interpretations given in their decisions by national and arbitration courts to certain provisions of the contract forms used (for example, FIDIC model contracts);
g) Published awards.

Another supporter of the "method lex mercatoria", E. Gaiad, adds scientific monographs to the list of O. Lando, affecting numerous specific problems. From O. Lando's explanations for each of the proposed elements of the lex mercatoria, one can deduce some semblance of their hierarchy based on the obligatory nature of one or another element for an arbitrator resolving an international commercial dispute. The norms of international public law that which are considered mandatory for arbitrators, the general principles of law, model contracts and reservations of states go to the first part. The unified laws, rules of international organizations, customs and usage trade, interpretations of model contracts, published arbitration awards go the second part of sources[20].

[20] Lando, O. (1986). The law applicable to the merits of the dispute. *Arbitration international*, 2(2), 145.

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As discussed above, the widely accepted practice is considered to be one of the elements of lex mercatoria. Article 6 (1) of the Civil Code[21] defines the term "business practice" as "a rule of conduct that has developed and is widely used in any area of business". The same article refers that it is not necessary for business practice to be recorded in any document, however, it must not be mentioned in the legislation of Uzbekistan. It can be concluded that if any practice used within the business community is transferred to the legislation, it loses its status as a business practice. This particular requirement of civil legislation prevents the parallel existence of business practice with the law of the Republic of Uzbekistan.

Article 6(2) of the Civil Code separately mentions "local customs and traditions", which allows distinguishing the separate nature of business practice with local customs and traditions. That is to say, we can deduce that permission of the Civil Code to apply business practice does not contain any local character and even the practice widely established within the international business community also meets the requirement of Article 6(1) of the Civil Code.

As for the application of the principle in arbitration, the following methods of have been noticed in practice:

a) Express choice;
b) Implied choice;
c) Applying lex mercatoria against parties will.

The wording of the Article 44 (1) of Arbitration Law[22] allows an arbitral tribunal to decide cases applying "rules of law", which is the exact repition of the Article 28(1) of Model Law. According to many authors, the usage of the term "rules of law" rather than the term "law" can be construed as making lex mercatoria appropriate to be an applicable law of a dispute.[23]

However, Article 44(3) of the Arbitration Law of Uzbekistan requires to apply a "law" which is subject to determination pursuant to choice of law rules in the event the parties failed to designate any applicable law to their dispute. According to this provision, the power of an arbitral tribunal to apply lex mercatoria as the governing law of a dispute is limited.

Where the arbitral tribunal strongly insists on choosing lex mercatoria as the governing law, it would be hard to enforce the final arbitral award and there would probably be two obstacles: either the revocation or refusal to enforce.

To talk about the revocation of the arbitral award, the Article 50 of the Arbitration Law establishes that it may be revoked if the court finds that derogation from the rules of the Article 44 of the Arbitration Law is a reason to find the awards contrary to the countries public policy.

To continue with the refusal to enforcement, the court may base on the similar ground in Article 52 of the Arbitration Law of Uzbekistan concerning the public policy and refuse the enforcement of the arbitral award under which lex mercatoria was chosen by the tribunal as the governing law of the dispute.

Based on the aforementioned, it is concluded that for Uzbekistan it is more beneficial to support the position which suggests that lex mercatoria can act as an applicable law. Including necessary amendments to

[21] Civil Code of the Republic of Uzbekistan
[22] The Law of the Republic of Uzbekistan "On International Commercial Arbitration"
[23] Born, G. B. (2020). *International commercial arbitration*. Kluwer Law International BV, 2441.

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the Law of the Republic of Uzbekistan which consider removing all barriers for the lex mercatoria to be chosen as the applicable law may help to stand out from the other legislations which attracts the parties of the dispute to choose the country as the seat of arbitration.

SUMMARY

This paper has attempted to analyze how it has shaped through the different periods of time and how it is now being suggested as a governing law to the dispute. It seems to the author that the position of the legislation of Uzbekistan in the issue should encourage the norms of lex mercatoria to act as a separate applicable law to disputes. The reason for this conclusion is closely based on the ambition to make the country as attractive as possible as a seat of arbitration for the dispute.

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