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LEX-MERCATORIA PRINCIPLES: A KEYSTONE IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract: The international Commercial Arbitration is a dispute resolution mechanism. Thus, it allows the parties to a dispute to settle their affair outside the national courts. On the other hand, lex mercatoria can be defined as a body of rules that encompasses usages and customs that were used by the merchants in the medieval ages, thus the English nomination "merchant law'. After globalization, more specifically in the twentieth century, both above-mentioned concepts have been developed and adopted by most of the legal systems around the world. This paper aims to define lex mercatoria by exploring its' history, its' development, and by tackling all its' elements to study the impact of lex mercatoria's principles on international commercial arbitration proceedings.

Keywords: International Commercial Arbitration, Lex Mercatoria, Applicable Law, Arbitration, Arbitrator, Contracts, UNIDROIT

Lex-Mercatoria elvek: A nemzetközi kereskedelmi választottbíráskodás sarokköve

Absztrakt: A nemzetközi kereskedelmi választottbíróság egy vitarendezési mechanizmus; így lehetővé teszi a vitás felek számára, hogy ügyeiket a nemzeti bíróságokon kívül rendezzék. Másrészt a lex mercatoria olyan szabályrendszerként határozható meg, amely magában foglalja a kereskedők által

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a középkorban használt szokásokat, így az angol „merchant law" megnevezést. A globalizációt követően, pontosabban a huszadik században mindkét fent említett koncepciót a világ legtöbb jogrendszere átvette és fejlesztette. A tanulmány célja a lex mercatoria meghatározása történetének, fejlődésének feltárásával, valamint minden elemének vizsgálatával, valamint, hogy tanulmányozza a lex mercatoria elveinek a nemzetközi kereskedelmi választottbírósági eljárásokra gyakorolt hatását.

Kulcsszavak: memzetközi kereskedelmi választottbíróság, Lex Mercatoria, alkalmazandó jog, választottbíróság, választottbíró, szerződések, UNIDROIT

Lex-Mercatoria-Prinzipien: Ein Schlüsselkonzept in der internationalen Handelsschiedsgerichtsbarkeit

Abstrakt: Die internationale Handelsschiedsgerichtsbarkeit ist ein Streitbeilegungsmechanismus; Dadurch wird den Streitparteien die Möglichkeit gegeben, ihre Angelegenheit außerhalb der nationalen Gerichte zu regeln. Andererseits kann die Lex Mercatoria als ein Regelwerk definiert werden, das die Gebräuche und Bräuche der Kaufleute im Mittelalter umfasst, daher die englische Bezeichnung „Merchant Law". Nach der Globalisierung, genauer gesagt im 20. Jahrhundert, wurden beide oben genannten Konzepte entwickelt und von den meisten Rechtssystemen auf der ganzen Welt übernommen. Dieses Papier zielt darauf ab, die Lex Mercatoria zu definieren, indem es ihre Geschichte und Entwicklung untersucht und alle ihre Elemente in Angriff nimmt, um die Auswirkungen der Grundsätze der Lex Mercatoria auf internationale Handelsschiedsverfahren zu untersuchen.

Schlagworte: Internationale Handelsschiedsgerichtsbarkeit, Lex Marcatoria, Anwendbares Recht, Schiedsverfahren, Schiedsrichter/Schiedsrichterin, Verträge, UNIDROIT

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Introduction

When an agreement results in a dispute between the parties, despite if the latter will be resolved by a judge in a national court or by an arbitrator via arbitration, to settle the dispute, the arbitrator shall rely on the parties' agreement as a primary source to proceed further. Examining the contract requires the arbitrator to rely on various legal instruments to analyze the contract; hence, to diligently identify the rights and the obligations of each party.

Despite the criterion of impartiality, the essence of the problem is the applicable law, be it national or international, the applicable law will be used to analyze and explain the contract. Generally, national laws emphasize on the protection of the State's sovereignty which might restrict and diminish the importance of the commercial character of a contract, it might also be reluctant to some essential elements when settling a dispute with a commercial aspect. Consequently, all these factors might negatively affect the arbitral award, thus jeopardizing the commercial aspect of the parties' agreement which will impede the arbitrator from taking at heart the interest of both parties and serving the framework that they have tried to build.

1. History of Lex-Mercatoria

"Lex mercatoria" is the Latin original version of "The Law Merchant" in English law, it dates to the "medieval period"[i], where a cumulative, societal and legal development has led to the creation of a body of commercial law that encompassed usages, customs, and practices used by the merchants to regulate their commercial activities. "For most of the authors of modern theories on lex mercatoria, medieval lex mercatoria represents the romantic ideal of an autonomous and uniform law created by and for international merchants, independent from the contemporary legal framework" (Elcin, 2012, p. 2). For a better understanding of lex mercatoria and its' whereabouts, it is crucial to comprehend the historical circumstances that led to the creation of the merchant law.

From a cultural point of view, it is important to mention that all ancient (Egyptians, Phoenicians, Carthaginians, etc.) have had a cardinal imprint in the history of commerce, but unfortunately none of these were preserved. Hence,

DOI 10.24169/DJM/2023/1-2/1

the starting point of our historical throwback is the fourth century BC, an indirect knowledge of the "*Lex Rhodia*"[ii] that was indirectly used through Roman Law. Conversely, the first direct and preserved texts of law belong to the Athenians. "The Athenian laws, however, are the first of which we have preserved texts, they were also eager traders to such an extent that the Athenian calendar was divided into the navigable and the unnavigable season" (Lethmer-Wemmer, 2005, p. 184). The lex mercatoria was highly influenced by the Roman law, the latter comprised a set of rules born through a fusion of the civil law (*jus civile*), the international trade law (*jus gentium)*, and the principles of equity (*aequitas*). In the first century AD, the commercial practices of large trading commercial towns were being codified and formed a transnational source for merchants, *Consulato Del Mare* was one of them. As Wethmar-Lemmer (2005, p. 188) has expressed, Barcelona, also known as the Consulato Del Mare (1340 AD) has become a body of commercial custom that was highly recognized on the international scene. Moreover, a very important statute was created back in 1353 AD, the "Statute of the Staple", it was promulgated and has highlighted the importance of lex mercatoria. According to the Merriam-Webster Dictionary, the "Law of the staple" refers to a medieval English statute regulating the export and import of certain goods ("Law of the staple," Merriam-Webster.com Dictionary, n.d.). The Statute has also unambiguously provided that the Staple Courts were to apply the law merchant (lex mercatoria) and not the common law (Bane 1983, as cited in Wethmar-Lemmer, 2005, p. 191). Furthermore, the Americans were under the British colony, and after the American revolution in 1776, they have adopted the English common law, thus the adoption of lex mercatoria as the bedrock of the code of commerce.

It is important to highlight that an enormous downfall has dominated the transnational commercial activity after the second century AD, but the 12th century was the turning point when the Crusades have inspired Europe and the latter got back on the international trading track. Lex mercatoria had a Roman law character and was also influenced by the Rolls of Oleron, the English Admiralty Law, and the laws of Wisby. From the 16th century onwards, lex mercatoria was a legal concept applied on a universal scale, thus it has gained its' transnational character, but sovereign States tended to give a greater consideration to their local rules and diminish the role and the importance of lex mercatoria. During the fourteenth and the fifteenth century, lex mercatoria was adopted by the Court of Admiralty which prompted inconvenience for some elite

DOI 10.24169/DJM/2023/1-2/1

judges, hence the latter have tried relentlessly to fight these set of rules that held a major Roman law character by avoiding its' application. During the eighteenth century, two distinguished common law judges, Lord Mansfield and Lord Holt attempted to solve the common law animosity towards lex mercatoria, as a result, they have succeeded to solve the problem, but most importantly to re-integrate the lex mercatoria into the common law of England. However, from the sixteenth until the nineteenth century, the lex mercatoria became synonymous with localized merchant practice and was no longer the sole determinant of acceptable behavior in business affairs (Trakman, 1981, as cited in Wethmar-Lemmer, 2005, p. 193).

All these events have contributed to the creation, codification, and the development of lex mercatoria in the international world of commerce. However, the 20th century was the century of industrial and commercial globalization, where all the legal systems, national and transnational instruments, and legal bodies have integrated lex mercatoria and have worked on developing and codifying its' principles. As a result, in 1919 the International Chamber of Commerce (ICC) was founded and in 1936 the first International Commercial Terms (INCOTERMS) were introduced. Moreover, the International Institute for the Unification of Private Law (UNIDROIT) came to life and created the UNIDROIT Principles on International Commercial Contracts (UPICC), furthermore, the United Nations Commission on International Trade Law (UNCITRAL) was founded in 1966 and drafted the Model Law to assist states to reform laws on arbitral proceedings.

The analysis of lex mercatoria's history portrays the stages of its' creation and development, besides, the adoption of such an old set of rules by nowadays' most leading institutions and legal systems around the world proves it's importance. Furthermore, exploring the principles of lex mercatoria will help to shed light on the significance of the latter in International Commercial Arbitration.

2. Principles of Lex-Mercatoria

Various principles fall under the scope of lex mercatoria, alongside others, four essential principles constitute the solid base on which the arbitrator can rely to objectively analyze the agreement's content and assure its' application, thus, enhancing the quality of arbitral awards and guaranteeing the promotion of justice.

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2.1. Freedom of Contracts

In recent history, all States were obsessed with the concept of sovereignty, hence national laws were considered the primary legal instrument in governing all the civil and non-civil matters that might occur within the territory of the State, or in any matter that is directly or indirectly related to the latter. Consequently, the commercial activity, more specifically the commercial arbitration was highly affected with the afore-mentioned behavior, as a result, many restraints and limitations were imposed and have impeded the prosperity of the transnational commercial activity. Globalization was the catalyst behind the emergence of international commerce and the restoration of the global concept of liberalism. "Today there seems to be a widespread consensus among the national legal systems about the freedom of contract and belief that the freedom of contract will encourage entrepreneurial spirit, that it will increase production, that it is one of the causes of wealth, and that it was the lack of this freedom which among other things caused the poverty of socialist states" (Ole, 1997, as cited in Elcin, 2012, p. 191). The freedom of contract is a concept with a tremendous magnitude on the international legal scene, thus all the legal instruments (conventions, uniform laws, national laws, usages, etc.) have adopted it, and have always tended to assure its' application. UNIDROIT, the legitimate organization behind the creation of many international conventions and soft law instruments has drafted its' first edition of UPICC which was published in 1994, and the latter is a major international legal instrument in the sphere of international contract law.

UPICC has briefly defined the freedom of contract in its' article 1.1 as follows: "The parties are free to enter into a contract and define its content" (UNIDROIT Principles on International Commercial Contracts, 2016, Chapter 1, Article 1.1, n.d.). Additionally, another definition was given by the Principle on European Contract Law (PECL) in its' article 1: 102: (1): "Parties are free to enter into a contract and to determine its contents, subject to the requirement of good faith and fair dealing, and the mandatory rules established by these principles" (. This concept also referred to as "Party Autonomy" was dictated in the United Nations Convention on Contracts for the International Sales of Goods (CISG) by giving the parties of a contract the autonomy to shape the framework and the content of their contract. The CISG in the first paragraph of its' article 4 has implied that the convention only governs the rights and obligations of the parties, therefore the parties are free to arrange their contract as they wish (Convention on the

DOI 10.24169/DJM/2023/1-2/1

International Sales of Goods, 1988, Part I, Chapter I, Article 4, p. 2). This concept was also upheld by the French legal system and inserted in the civil code "Code Civil Francais" in article 1102, people are free to contract whomever party that they want and also to determine the content and the scope of their contract (Code Civil Francais, 2022, Livre III, Titre III, Sous-titre I, Chapitre I, Article 1102, p. 345). Hence, the freedom of contract does not only cover the purpose and the content, but also the choice of the parties, therefore people are free to contract any other party, be it a natural person, a legal entity, or even a State. Nonetheless, when it comes to the choice of the party, the concept of freedom of contract may not be absolute in the means of open commercial competition due to some restrictions imposed by the public authorities of the designated State, which might prevent the establishment of a commercial contractual relation with a supplier or a certain public body. Such limitations fall under the scope of national laws and vary from a State to another, depending on the inner public policy adopted by the State. This exception was also stipulated in the official commentary of the UNIDROIT Principles on International Commercial Arbitration 1994 article 1.1, comment 2 provided that the freedom of contracts is not absolute, it might be limited by some exceptions imposed by the State, where the latter can decide that matters in specific economic sectors might be subject to the public interest, thus it will be excluded from open competition (UNIDROIT Principles on International Commercial Arbitration, Official Commentary, 1994, Article 1.1, comment 2, p. 2)

Nevertheless, it is important to mention that the contract governing the relation between the parties shall meet all the legal requirements which are globally known and embodied in every national and international law. Generally, these requirements are the free consent of the parties, the absolute absence of a fraud that may lead one party to contract without the anticipated knowledge of it, or a coercion that forced the party to contract outside of their free will, etc. Many examples can be given regarding this previously mentioned pre-requisite, it was stipulated in the Russian Civil Code article 421 that the element of freedom is the keystone when it comes to concluding contracts by a natural person or a legal entity, unless the Code or any other national law states otherwise (The Civil Code of the Russian Federation, 1994, Chapter 27, Article 421, n.d.). Moreover, this prerequisite was also stipulated in the Lebanese Civil Code "Code Des Obligations et Des Contrats" which was inspired and dictated after the 3rd Napoleonic French Code, where article 59 had stipulated the following: "The

DOI 10.24169/DJM/2023/1-2/1

Consent shall be considered void if given by error, due to a fraud, or extorted by violence." (Code Des Obligations et Des Contrats Libanais,1989, Section 2, Paragraphe 3, Article 59, n.d.). As expressed by Elcin (2012, p. 193) "In cases where lex mercatoria is applicable, the parties exercise their freedom of contract to dispense with the control of legal uncertainty by a legal system and enter into transactions governed through legal uncertainty, from which the questions of residual contractual rights, obligations, and risks arise, while expressing their confidence in the specialization of the decision maker in the control of legal uncertainty". Hence, ruling the legal uncertainty falls under the competence of the arbitrator which is a task consigned for the latter by the contracting parties.

2.2. Legal Certainty

The legal certainty guarantees the contracting parties the prevention of any interference of a third party, and most importantly to oblige the arbitrator (Arbitrator/judge) to abide by the articulated rules and the chosen law and to give greater consideration to the circumstances and the intentions of the parties.

Additionally, when applying lex mercatoria in international commercial arbitration, arbitrators are compelled to deal only with the issues submitted to them by the parties and to not exceed this delegation or involve any other third party. If any of the arbitrators violates the dictated terms or the scope of the submission, the arbitral award will be set aside or will fail to be granted recognition and enforcement. The latter concept of abiding by the terms or scope of submission was upheld by many national and international legal instruments. An arbitral award dated 4 January 2018 by Teresa Cheng (鄭若驊), Chung-Teh Lee (李宗德) and Peter Thorp of the case (X v Y (HCCT 62/2018), 2020, n.d.), was set aside by the court. The Hong Kong Court of the First Instance has rejected an appeal from its' earlier decision to enforce an arbitral award, hence the award was set aside, and one of the major reasons was that the tribunal's findings exceeded the parties' submission to arbitration and the scope of arbitration clause. Switzerland's Federal Code on Private International Law in its' article 190 (IX. Finality, appeal) (2) stipulated that the arbitral award can be challenged if the tribunal have ruled on matters beyond the claims submitted to it or have failed to rule on one of the parties' claims.

DOI 10.24169/DJM/2023/1-2/1

These previously mentioned decisions upheld by courts from different legal systems all over the world show how important is the influence of lex mercatoria on the arbitrator. Despite the differences in the legal systems, the decision seems always to abide by these set of rules.

Moreover, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 which is considered the number one international legal instrument signed by most of the countries around the world has adopted this concept in its' Article 5 (1) (c) providing that the award shall be set aside if the decision exceeds the scope of the arbitration or if it contains decision that exceeds the parties' submission. However, the award can be partially enforced if it includes many decisions, but only the ones that fall under the scope of the submission will be enforced and the rest will be set aside. (U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Part I, Article V, p. 9). On the other hand, The UNCITRAL Model Law on International Commercial Arbitration in its' Chapter VII, article 34 (2) (iii) provides that arbitral award can be set aside by the court if the arbitral award deals with a matter beyond the scope of submission or contains a decision that does so (The UNCITRAL Model Law on International Commercial Arbitration, 1994, Chapter VII, article 34 (2) (iii), p. 12)

It is important to add that both New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and The UNCITRAL Model Law on International Commercial have a clause in common, the separation and the division of the award's content. If the award is denied but contains a part which falls under the scope of the submission of the parties, and if that part can be separated from the one that contains a decision that does not fall under the scope of the submission, then the latter would be set aside, and the former will be granted recognition and enforcement.

2.3. Sanctity of contracts

The principle of freedom of contracts cannot be separated from another principle known as the sanctity of contracts, this notion was mentioned in the commentary on the UNIDROIT Principles on International Commercial Arbitration stating that in transnational contract law, these freedoms are cumulative and cannot be separated (UNIDROIT Principles on International Commercial Arbitration, n.d., Comment 1, n.d.). The principle of sanctity of contracts has two cumulative

DOI 10.24169/DJM/2023/1-2/1

aspects, one is related to the binding effect of the content of the contract (The choice of law, the place of execution, etc.), conversely, the second aspect is all about the freedom of the parties to exclude or alter their contract, whereas this modification should not be unilateral and shall not contradict with the public order of the State where the contract will be executed. Moreover, the latter concept constitutes a unique principle in lex mercatoria, thus, it will be tackled under the title of the second aspect of the sanctity of contracts: "Exclusion or modification by the parties".

2.3.1. The Binding Effect of the Contract

As for the first aspect "The contract's binding effect on the parties ", it constitutes the base upon which the parties build their contractual relation, besides, it assures that each party will perform its' obligation stipulated in the valid contract. This principle is also known as "*Pacta Sunt Servanda*", and the latter is a Latin expression that stands for "Agreements must be kept" or "Pacts must be respected", it is an old expression that governed all the international treaties and the transnational commercial and non-commercial pacts when it comes to the execution of the obligations and the promises of the contracting parties. *Pacta sunt servanda* has a historical background, although its' origins derive from the Roman Law, it was spread and used by various cultures for commercial and non-commercial matters. With the same definition but under different nomination, this concept was mentioned in al Quran, which is the primary and the fundamental rule of law for Muslims all over the globe. Moreover, the Latin expression constituted the subtitle of article 26 of one of the most important conventions in the recent history, The Vienna Convention on the Law of Treaties in its' Part III, Section 1 ", article 26 titled "Pacta sunt servanda" provided that when a treaty enters into force, parties of the latter must act in good faith (The Vienna Convention on the Law of Treaties, 1969, Part III, Section 1, Article 26, p. 11). Due to its' importance in all legal systems, The UPICC 2016 devoted the principle of *pacta sunt servanda* in its' article 1.3 which emphasizes the binding effect of a valid contract (UNIDROIT Principles on International Commercial Contracts, 2016, Chapter 1, Article 1.3, n.d.). The latter was also stipulated in the TRANS-LEX Principles, providing that, legally, enforceable agreements bind the involved parties, the contract can only be altered or ended with the agreement of the parties involved or as specified by the law; unless there are legal justifications for non-performance, the parties are obligated to fulfill their respective obligations as

DOI 10.24169/DJM/2023/1-2/1

stated in the contract "pacta sunt servanda" (Klaus Peter Berger, 2020, IV 1.2 (a), n.d.). Moreover, the binding character applies and obliges the parties to perform their obligation to the last extent, even in the case of change of some circumstances, e.g., the cost of performance. The latter concept was upheld by the PECL, the first paragraph of article 6:111 (1) provides that regardless of any increased burden, whether due to higher costs or diminished value of received performance, a party remains obligated to fulfill its responsibilities (The Principles on European Contract Law, 1995, Chapter 6, Article 6:111 (1), n.d.)

Aside from being a part of the instruments of lex mercatoria, as previously mentioned, this concept was dictated in many national laws, where the latter have devoted the principle of sanctity of contracts as an essential principle in their civil codes and national pacts. Article 119 of the Civil Code of People's Republic of China has stipulated that a contract that is established in compliance with the law holds legal validity, imposing binding obligations upon the involved parties (Civil Code of the People's Republic of China, 2020, Book One, Chapter V, Article 119, p. 22). Furthermore, the Canadian national law in the Civil Code of Québec has devoted the principle of binding force of a contract, and the article went beyond the application of the articulated rules, to impose on the parties the performance of their obligations in accordance with their intentions and the circumstances of the contract in conformity with usages, equity, and law (Code Civil Du Quebec, 1991, Section V, Paragraph I, Article 1434, n.d.). At last, the principles on international commercial arbitration of the Organization for the Harmonization of Business Law in the Caribbean (OHADAC) in its' article 1.2 "Pacta Sunt Servanda" stipulated that the parties are bound by their obligations according to the contractual terms that they have dictated (Convention Organisation for the Harmonisation of Business Law in the Caribbean, 2015, Chapter 1, Article 1.2, n.d.)

The principle of sanctity of contracts encompasses a major concept, the sacredness of the articulated rules, more precisely the clauses inserted by the parties of the contract. Apart from the importance of the specified law or set of rules that parties chose in their contract, sometimes they insert one or many clauses that portray the circumstances of their agreement and their intentions.

It is important to mention that in the simultaneous presence of contractual clauses and another set of rules, the former will prevail unless it contradicts with the public order. In the case of a discrepancy between the contractual clauses and

DOI 10.24169/DJM/2023/1-2/1

the chosen set of default rules, the contractual clauses will prevail as a result of the primacy of the knowledge of particular circumstances of time and place in the context of the spontaneous order of international commerce, over the knowledge that has been accumulated and articulated by the outsiders in the form of default rules (Elcin, 2012, p. 193). Many principles were adopted by the arbitral tribunals under the auspices of Cairo Regional Center for International Commercial Arbitration (CRCICA), and the first principle is titled "pacta sunt servanda", it roots for the sacredness of the parties' clauses. The principle provides that a contract as an agreement between parties, can only be terminated or modified with the mutual agreement of those involved, as it falls under the realm of private law, additionally such contractual agreements take precedence over the regulations outlined in the Civil Code, except in cases where they conflict with matters related to public order (www.trans-lex.org. (n.d.). The Most Recent Legal Principles Adopted by the Arbitral Tribunals under the Auspices of the Cairo Centre, CRCICA-Newsletter, Jan. 1997, section 1, page 2 et seq.)

The Sanctity of contracts was upheld by an arbitrator's decision in a famous case in the world of international commercial arbitration, the LIAMCO case. Under the Petroleum Law of Libya of April 1955 concessions (LIAMCO v. The Government of the Libyan Arab Republic, 1981, n.d.), whereas after some transfers, the Libyan American Oil Company (Based in USA, Delaware) had arranged a bilateral agreement with the official Libyan Petroleum Commission and it was approved by the Libyan Minister of Petroleum, whereas the latter agreement complies with the Libyan Petroleum law of 1955 and it contained a clause (clause number 28), an arbitrability clause to settle any dispute that may arise from this contractual relationship. After a change in the Governmental regime, the shares of LIAMCO were nationalized twice, that's when LIAMCO has requested arbitration referring to the contractual clause 28, and when the Libyan Government has failed to appoint an arbitrator, LIAMCO has asked the International Court of Justice to appoint a sole arbitrator. Nevertheless, The Libyan Government has refused to arbitrate any case, basing its' argument that arbitration is contrary to the heart of its' sovereignty. The sole arbitrator Dr. Sobhi Mahmassani has decided on the matter, and his decision was based on the concept of Sanctity of contracts, and in the Latin maxim that "Pacta sunt servanda" (pacts are to be observed)". Moreover, the decision was based on article 147 of the Libyan Civil Code which provides that the contract serves as the governing principle for the parties involved and it embodies their legal

DOI 10.24169/DJM/2023/1-2/1

obligations. It cannot be invalidated or altered without the mutual consent of the parties, unless circumstances recognized by the law permit such modifications (The Libyan Civil Code, 1954, Article 147, p. 30). Besides, article 148 paragraph 1 of the same code provides that the performance of a contract shall adhere to its stipulated terms and be conducted in a manner that aligns with the principles of good faith (The Libyan Civil Code, 1954, Article 148, p. 31). Moreover, the decision was also based on the principles of International Commerce, Anglo-Saxon common law, Roman law, Napoleonic code, European civil codes, Ottoman Majallah Code, and Islamic Jurisprudence.

As a result, the decision was a direct application of the concept of sanctity of contracts, where the Libyan State could not avoid arbitration due to the valid contract that binds both of its' parties, and none of the latter could unilaterally modify its content.

2.3.2. The exclusion or the modification by the parties

Modifying the contract is one of the most essential principles of lex mercatoria, it emanates from the principles of freedom of contract. To modify or exclude or derogate certain provisions, a cumulative consent of the parties must be expressed, besides, the exclusion or the modification should meet some requirements of a legal nature.

The afore-mentioned principle was consecrated through the articles of many legal instruments that are considered the core of lex mercatoria. Starting with the main source of lex mercatoria, the UPICC has promoted the principle of exclusion and modification of the parties due to the nature of these principles that are based on one solid pillar "the freedom of contracting". Chapter 5 of the latter convention provides that parties have the option to exclude the application of these Principles or modify the impact of any of their provisions, except in cases where the principles themselves stipulate otherwise; Thus, when drafting their contract, the parties are free to fully or partially exclude the principles, derogate them or vary their effect due to the non-mandatory character of these principles. Not to mention that this exclusion could be either express or implied (UNIDROIT Principles on International Commercial Arbitration, Official Commentary, 1994, Article 1.5, Comment 1; Comment 2, p. 11). However, this principle is not absolute, it is governed by some exceptions which are the mandatory rules of the provisions of the UNIDROIT principles, such as the principle of good faith and

DOI 10.24169/DJM/2023/1-2/1

fair dealing. The latter were inserted as principles in article 1.7 of this convention, hence the parties can never exclude or derogate the principle of good faith and fair dealing (ibid., Article 1.7).

Implicit derogation occurs when the parties agree to contractual terms that conflict with the rules or principles outlined in the TransLex-Principles. Besides, another exception limits the principle of modification and exclusion, and article 1.4 titled "Mandatory Rules" has dictated this exception providing that These Principles shall not limit the application of mandatory rules, whether originating from national, international, or supranational sources, which are enforceable in accordance with the applicable rules of private international law. (UNIDROIT Principles on International Commercial Contracts, 2016, Chapter 1, Article 1.4, n.d.). The mandatory rule provision was also adopted by the Principles on the European Contract Law in its' article 1:103: "Mandatory Rules". On one hand, the first paragraph of the article provides that if the governing law permits, the parties have the option to select the principles as the governing framework for their contract, resulting in the exclusion of applicable national mandatory rules. On the other hand, the second paragraph of this article provides that mandatory rules of national, supranational, and international law that are applicable regardless of the governing law of the contract must still be respected and upheld in accordance with the relevant provisions of private international law (The Principles on European Contract Law, 1995, Chapter 1, Article 1:103, n.d.). As a result, parties may apply only the principles of the convention with no regard to the national law only if the applicable law allows so, and in all means, the governing law of the contract cannot contradict the provisions of the applicable law. In other words, the content of the contract chosen by the parties cannot contradict the provisions of public order or any other law with a higher hierarchy of the place of execution of the contract. In international commercial arbitration, the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has stipulated in its' Article V that if the award rendered contradicts with the law of the State where arbitration is sought, it must be set aside (U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Part I, Article V, p. 9).

The United Nations Convention on Contracts on the Sales of International Goods (CISG) in the first part of its' introduction has also adopted the principle of exclusion and modifying, and in article 6 it was provided that the parties have the liberty to deviate from the provisions of this convention by selecting the law

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of another contracting state or the domestic substantive law of a contracting state as the governing law for their agreement (Convention on the International Sales of Goods, 1988, Part I, Chapter I, Article 6; Article12, p. 2; p. 4)

2.4. Good faith and fair dealing

Good faith and fair dealing are the pillars of contracting, the dictated terms constitute the solid base upon which the agreement is formed, thus when parties commit to perform their obligations, they shall do so with a good faith to guarantee the best form of the contracts' execution.

The concept of freedom and sanctity of contracts is characterized by a tremendous magnitude in all national and international legal instruments, be it in commercial or non-commercial matters, and this magnitude was reflected throughout this paper. However, the only hurdle that might restrict the parties' freedom is a contradiction between the content of their agreement and the mandatory rules (in case of the application of lex mercatoria), the public order of the applicable law, and most importantly if the content does not promote good faith and fair dealing. Good faith and fair dealing are crucial in the legal contracting field, be it in the stage of formation of a contract, its' interpretation, and even the supplementation emanating from the arbitrator. Hence, the concept of good faith and fair dealing shall always prevail and must be respected.

The PECL have partially defined the good faith and fair dealing through article 1:201 providing that both parties are required to conduct themselves in a manner consistent with good faith and fair dealing (The Principles on European Contract Law, 1995, Chapter 1, Article 1:103, n.d.). Moreover, it was also defined by the UNIDROIT Principles on International Commercial Contracts through article 1.7 with the same exact definition, but a slight difference in the scope of its' application, whereas its' application was dedicated to the application and promotion of good faith and fair dealing in international trade. However, despite the nature or the field of contracting, good faith and fair dealing cannot be excluded or restricted by the parties involved (UNIDROIT Principles on International Commercial Contracts, 2016, Chapter 1, Article 1.7, n.d.).

It is hard to define the principle of good faith and fair dealing, however, it is essential to mention that the latter principle has a historical background that dates to the Greeks and the Romans "*bonae fidei*". A faultless philosophical definition

DOI 10.24169/DJM/2023/1-2/1

of good faith was given by Cicero:" These words, good faith, have a very broad meaning. They express all the honest sentiments of a good conscience, without requiring a scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance" (De off, as cited in Iftime, 2015, p. 133)

As a result, with the development and the codification of legal principles, the principle of good faith has begun to gain a greater importance and its' existence and application became compulsory and have governed every single contractual relationship. The French Civil code of 1804 has stated that whenever parties enter into an agreement, they shall respect that agreement and execute it with good faith. (Code Civil Francais, 1804, Chapitre III, Section I, Article 1134, n.d.). The good faith principle was also promoted through the Finnish Contracts' Act in the second Chapter "Authorization", where section 33 stated that each legal transaction had to be compatible with honor and good faith or it will be invoked (The Finnish Contracts Act, Chapter II, Section 33, n.d.).

On the other hand, regarding the principle of fair dealing has a great importance in the sphere of commercial arbitration, it requires that the parties of a contract will be equally treated throughout the process of arbitration (notice period, collecting evidence, etc.) it is also called "due process". Arbitration rules of UNCITRAL have guaranteed this principle through article 15 of the third Section "Arbitral Proceedings". The first paragraph of this article provides that within the framework of these Rules, the arbitral tribunal has the discretion to conduct the arbitration in a manner it deems suitable, ensuring equal treatment of the parties and granting each party a complete opportunity to present their case at any stage of the proceedings. Moreover, paragraph three of the same article provides that Any documents or information provided to the arbitral tribunal by one party must be simultaneously shared with the other party by the party submitting them.

The principle of good faith and fair dealing is a vague concept, and its' application has led to some uncertainty in the legal sphere, whereas the development of this principle has witnessed various aspects.

DOI 10.24169/DJM/2023/1-2/1

The first common aspect is the principle of good faith that governed the contractual relation between the parties, the latter were obliged to act with good intentions towards each other when performing their obligations. Conversely, the second aspect was prolonged and did not only cover the contractual relation, but the scope of the principle was extended and has covered the interpretation of conventions and contracts in good faith to comply with the spirit of the text and the parties' intention. There has been uncertainty as to whether the principle of good faith concerns only the interpretation of the Convention and not the conduct of the parties in the formation and performance of the contract, or the interpretation of their intentions (Elcin, 2012, p. 206).

Hence, the concept of good faith has a double aspect, the first one relates to the behavior of the parties while the second one is connected to the interpretation of contracts and conventions.

2.4.1. Good Faith as a principle of a standard behavior

The chronological order of the historical events indicates that the principle of good faith before becoming a legal basis for the interpretation of contracts and conventions was the cornerstone of the contractual relationship and forced the parties to behave with good intentions. In medieval ages, the norms that governed the merchant law were based on the principle of good faith, and the latter served as an indispensable guideline, universally revered, and adhered to by all merchants in their trading endeavors. Each party had to behave with good intentions when performing its' obligation, and this reciprocity has built a guarantee that constituted the pillar of the international commercial activity.

However, various international and national legal instruments have promoted the principle of good faith as a principle that governs the contractual relation between the parties and orient the latter to behave with good intentions. Under the title "Standard of contract and liability of the guarantor/issuer", article 14 of the United Nations Convention on Independent Guarantees and Stand-By Letter of Credit has promoted the good faith principle by obliging the guarantor to act in good faith and reasonable care when discharging its obligation (United Nations Convention on Independent Guarantees and Stand-By Letter of Credit, 1996, Chapter III, Article 14, p. 7). Moreover, the principle of good faith has resurfaced in the European Directive 2005/29/EC of the European Parliament of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the

DOI 10.24169/DJM/2023/1-2/1

internal market under the notion "professional diligence" in article 2 (h) that defined the latter notion as the standard of special skill and care that a trader must be exercising towards his customers(the European Parliament and of the Council, Unfair Commercial Practices Directive,2006, n.d.). Additionally, the Council Directive of 18 December 1986 on the coordination of the laws of Member States relating to self-employed commercial agents stated in its' third article that the employee should act dutifully towards his principal in good faith (Official Journal of the European Communities, Council Directives in the Coordination of the Laws of the Member States relating to self-employed commercial agents, 1986, Chapter II, Article III, n.d.). Besides, this principle was promoted through international conventions, and more specifically the European codification in the previous paragraphs of this section (UNIDROIT Principles on International Commercial Contracts & Principles on European Contract Law). In the Middle Eastern legal sphere, the Egyptian Civil Code in its' article 148 has promoted the principle of good faith and fair dealing, providing that the performance of a contract must adhere to its stated terms and comply with the principles of good faith. A contract imposes obligations on the contracting party not only in relation to its explicit provisions but also encompasses everything that, based on law, custom, and fairness, is considered a necessary consequence of the contract, given the nature of the obligation (The Civil Code of The Arab Republic of Egypt,1949, n.d.)

2.4.2. Good faith as an instrument for interpretation

Apart from its role as a guide to orient the parties how to behave in their contractual relations while performing their obligations, the principle of good faith has also a second aspect, a standard principle for the interpretation of international and national legislative texts (conventions, treaties, laws, etc.) and contracts.

As for good faith as a principle of contractual interpretation, after being developed throughout decades, it is now considered a principal of lex mercatoria, as put by Lando (2007, as cited in Elcin, 2012, p. 338), the principles of European contract law and the UNIDROIT Principles attach a great importance to the principle of good faith under the influence of several laws mainly German, Dutch and American. In each of these legal instruments, good faith is promoted to the rank of general principle which covers all stages of a contract. Chapter 5 titled

DOI 10.24169/DJM/2023/1-2/1

"Interpretation" of the Principles of European Contract Law (PECL) has promoted this concept in its' article 5:102: "in interpreting the contract, regard shall be had, in particular to: … (g) good faith and fair dealing" (The Principles on European Contract Law, 1995, Chapter 5, Article 5:102, n.d.). Moreover, the UPICC 1994 have stipulated in its article 4.8 an interpretation method for a contract that is missing a term that was not dictated by the parties where the latter is essential for the determination of duties and rights, an appropriate term shall be supplied based on many factors and one of them is good faith and fair dealing (UNIDROIT Principles on International Commercial Contracts, 2016, Chapter 5, Article 5 :102, n.d.).

As for good faith as an instrument to interpret conventions and legislative texts, in this case it, is no longer about the intention of the parties and their behavior in a certain contract, but the whole convention or text should be interpreted in a manner of good faith and the content shall be analyzed based on the spirit and the objective of the text. A relevant example is article 7 (1) of the CISG, when interpreting this Convention, it is important to consider its international nature and the objective of fostering consistency in its application, while also emphasizing the adherence to good faith principles in international trade. Additionally, article 31 of the Vienna Convention on the Law of Treaties 1969 provided that a treaty should be interpreted in a fair and sincere manner, considering the ordinary sense attributed to its terms within the context of the treaty, as well as its overall objective and purpose (The Vienna Convention on the Law of Treaties, 1969, Part II, Article 7, p. 4).

Summary

Lex mercatoria as an applicable law is a double-edged sword, it gives the arbitrator the liberty of interpretation but also forces him to abide by the content and the framework of the parties' agreement and their scope of submission, besides, to impartially interpret the latter by giving the prime concern to the parties' best interests.

However, the limitations that might be imposed by a State through its' national legislative texts / regulations will always give the national authorities a leeway to protect the political and the commercial benefits of the country. Conversely, and by excluding matters that are directly related to public order, choosing lex

DOI 10.24169/DJM/2023/1-2/1

mercatoria as an applicable law, will on the first hand give the arbitrator more freedom to objectively analyze the case, and on the other hand, he / she will be forced to prioritize the interests of the parties, abide by the content of the contract, and not to deviate from his delegated scope of submission.

Given the fact that lex mercatoria was developed based on the practice of international commerce and later adopted by the majority of legal systems and institutions around the globe; when applied, it can be considered as a magical wand held by the arbitrator which he / she can use to enhance a big part of the arbitral proceedings whilst giving the greater consideration to the parties' interest, thus, turning international commercial arbitration as one of the most efficient and suitable alternatives to solve national and international commercial disputes.

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[i] Also known as the Middle Ages in European History, it lasted approximately from the fifth till the late fifteenth centuries

[ii] Also known as "Law of the Island Rhodes", a set of rules created around 475 BC and considered to be the first Maritime Code in History.