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Creation and Dynamics of Lex Mercatoria in Light of International Commercial Arbitration Procedure

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Abstract: *In the classical doctrines of private international law and in determining the substantive rights governing contracts, essentially, the arbitrator's or judge's efforts leads to choosing a specific or national legal system. The limitations of this choice (the analysis of which is beyond the scope of this study) are clear, even if the parties personally decide to use their contractual freedom to determine the governing law. In this regard, the doctrine has long been examining the idea of referring to an alternative legal system that is safe from inadequacies of choosing a domestic legal system. The Goldman's innovative theory about an independent and transnational legal system (Transnational Commercial Law or Latex Mercatoria) that is suited and exclusive for international business relations was introduced long ago. However, the ambiguity in its meanings, constructive elements, and origins still creates doubts in its originality and referring to it as an independent or complementary source of law. Nevertheless, the arbitrators have not overlooked this flexible and dynamic source in their sentencing, so that, although the initiation of this theory can be attributed to the doctrine, the constructive elements of this emerging legal system should undoubtedly be found in the International Commercial Arbitration Procedure. This study attempts to examine the role and contribution of international commercial arbitration procedure in redefining of Lex Mercatoria and identifying it as a well-known and codified source of law.*

Keywords: *Lex Mercatoria, Transnational Commercial Law, International Commercial Arbitration Procedure, Applicable Law.*

INTRODUCTION

Generally, efforts made for the identification and exertion of Lex Mercatoria stem from many jurists' belief that the domestic and international law are not suitable for trying the international commercial disputes between individuals involved in a transaction from various countries. According to these jurists, a national legal system cannot provide optimum answers to the expectations of the parties to the dispute from various legal systems with different backgrounds and the international law cannot be considered adequate in line with trying the cases related to transnational commercial transactions.

Therefore, a third legal system that is known as Lex Mercatoria which is neither a national law nor an international one rather a combination with the characteristics of the both can be a fascinating choice in this regard (Maniruzzaman, 1999).

Supporters of Mercatoria know it the law of the international commerce society that has been accepted by the majority of the countries engaged in international trade (Born, 2001).

Lex Mercatoria was taken into account by the international businessmen in the light of the traders' need for an impartial legal system matching the international commerce conditions, on the one hand, and in consideration of the various legal barriers rendering it difficult to sign and enforce transaction contracts based on national regulations, on the other hand.

Alongside with the problems related to the rule conflicts and incompatibilities of the solutions posited in the regulations for resolving disputes in various national law, absence of a unitary perception of the similar legal expressions, precedence and subsequence of loss compensation methods[1] in various legal systems, paying attention to the domestic procedures and interpretations of a country in lieu of paying attention to the international commercial procedures, exclusion of public order that could be unfairly interpreted in the domestic law by the national judges and unfamiliarity and costliness of learning a foreign national law were amongst the reasons that, as viewed by the merchants, made the administration of their transnational contracts using the national law of the other party or the law of a third country difficult and costly.

Besides these reasons, the need for the existence of uniform commercial principles transcending beyond the various national rule-making policies and specifically capable of administrating governing transnational commercial transactions was extremely felt during the recent decades by various institutions working parallel to standardization of the international trade.

The need is important in that if any government uses a different and separate collection of the principles and regulations parallel to the adjustment of the endorsed contracts to the jurisdiction of the international trade, it would be impossible for the uniformity of the regulations governing the transnational commercial transactions to be actualized even in a minimum level. The extant discrepancies in the national rules and regulations would influence the contract interpretation and enforcement and this might cause an increase in the discrepancies and attainment of results in the course of legal resolution of the disputes that are unpredictable for both of the parties to the dispute. Such a lack of confidence in the predictability of the trial results makes the merchants lose their ability of making decision based on their contingent prediction of the future trial results and this can per se cause doubts in the adjudication of the dispute which can result in the resolution of the dispute according to the financial and economic conditions of the dispute parties in favor of the stronger party. In other words, if prediction of the trial results is presumed impossible and, generally, the law and mechanism of dispute resolution are found inefficient, the parties and, especially the weaker party, would evidently be forced to reach an agreement with the stronger party for the enforcement of the contract and the sure thing in such an agreement is that the merchant with a weaker financial situation cannot enjoy his or her legitimate economic interests that could have been obtained in the light of the fair and just enforcement of the contract.

However, disputes regarding the various national regulations related to a contract can eventually considerably influence the interests of the parties to a transaction contract signed in the jurisdiction of the international trade; hence, it is necessary that uniform regulations and principles govern the transnational commercial transactions.

International contracts constitute special types of legal relations and their contractual elements are related to more than one legal system. The issue is crystalized when the resident location of the parties, the place of the contract conclusion or the place of its enforcement are variable (Gimenez Corte, 2012).

For instance, the contract signed in Paris and enforced in Tehran is considered an international contract. In these cases, since the contract is related to more than a legal system, it is necessary to specify which law can be enforced in respect to the various aspects of the contract should dispute arise. Parallel to finding an answer to this question, private international law utilizes its classic means, to wit regulations of dispute resolution that causes problems to the merchants in practice such as unpredictability of the results of enforcing the

[1] For example, the specific performance is the first way of compensating the loss in the jurisdiction of civil law countries whereas claim of damage is the method of loss compensation.

dispute resolution regulations due to the unevenness of the regulations in various legal systems and this is per se influential on the possibility of predicting the trial results or arbitration results that can enable prospective decision-making. Therefore, this is why it seems that the possibility of trying based on Lex Mercatoria has also been predicted in Iran's law, as well, considering Paragraph (T) of article 42 of the arbitration regulations and procedures of Iran's arbitration center of chamber of commerce in the light of the parties' independence in selecting the governing law, emphasis on the adoption of decisions based on the related commercial contract, mores and habits[2] as well as Paragraph (3) of article 27 of Iran's international commercial arbitration law[3], passed in 1998, and Paragraph (2) of article (30) of the arbitration regulations of Tehran's regional center, passed in 2005, that explicitly predicts the possibility of trying based on fairness and arbitration in line with avoiding the conflict of the regulations and veneration of the dispute parties[4]. It is worth mentioning that predictability is amongst the advantages of a legal system and it is based on this property that the parties, assumed herein as international, can seminally make decisions according to the predictions of the trial decision as to whether compromisingly resolve their dispute or refer to arbitral courts or judicial courts based on their analyses of their trial interests and costs and in the light of the quality of the sentences to be issued. The simplicity and non-complexity of the riles and principles governing the international commercial contracts, on the one hand, and world-inclusiveness and perceptibility of its principles and regulations, on the other hand, can provide the merchants with this important option. In a comparison to the various national regulations, these properties can be more expected from Lex Mercatoria and, in this regard, it is emphasized in respect to Lex Mercatoria that it has to be considered as containing global principles, as a specimen, the principle of indispensability of commitment enforcement[5], and these principles have been predominantly authenticated in every legal system and, secondly, Lex Mercatoria should be considered as incorporating special standards for the formation (and enforcement) of contracts and, finally, Lex Mercatoria should also take into account the growing jurisdiction of the international commercial arbitration (Shmatenko, 2013, p.93).

Thus, Lex Mercatoria is apparently commissioned to more optimal administration of the transnational commercial contracts and it is considered more suitable for the administration of these contracts in contrast to the national conflict resolution regulations and it is in this regard that it has drawn the attentions of the merchants as the activists of the financial and economic markets because the merchants take measures parallel to the selecting or not selecting a legal system based on their analysis of their profit and cost.

It is worth mentioning that, in trying the international contracts, the national courts know the enforcement of their dispute resolution regulations as necessary based on the authority stemming from their own judicial jurisdiction and they also determine the law governing the lawuit based thereon. In fact, based on this option, the national courts are authorized to make decisions about the formative subject of the law governing the lawuit filed to them. The principle of independence authenticated as one of the most popular principles of contract law in the regulations on law conflicts of the majority of the legal systems for dispute resolution stipulates the possibility of selecting transnational commercial regulations or the very Lex Mercatoria in the international contracts. However, in various decisions made by various national jurisdictions, the parties cannot usually exclude the enforcement of any national regulation via making negative choices of law (Elcin,

[2] "Arbitrator" is obliged to make decisions based on the contract's content in all of the cases and observe the business mores and habits.

[3] In case it is explicitly allowed by the parties, the arbitrator can make decisions based on fairness and justice or mediation.

[4] Although arbitration based on fairness and mediation differs from arbitration based on Lex Mercatoria, it seems that the arbitrator can recognize Lex Mercatoria as the most fair law for the administration of the parties' dispute with his or her authority of trying based on fairness and use this authority in line with selecting and exerting Lex Mercatoria. In fact, although, in arbitration based on fairness, the arbitrator is obliged to issue sentences based on fair behavior rules and principles while, in arbitration based on Lex Mercatoria, the arbitrator should consider the transnational principles constituting Lex Mercatoria, the arbitrator can consider Lex Mercatoria as the most fair choice for administrating a transaction concluded in the international business domain based on fairness and according to its match with the international business procedures. In this regard, emphasis on the fairness-based trial can mean implicit authority for trying also based on Lex Mercatoria.

[5] Pacta sunt servanda.

2012). However, in international commercial arbitration procedures, sentences are observed[6] in which it has been underlined that the parties' withdrawal from selecting any national law is interpreted as their implicit will for the governance of international commercial principles, i.e. the very Lex Mercatoria, over the contract (Janssen et al., 2009). Based thereon, some writers believe that the exclusion of the national regulations should be considered as the parties' will for the administration of the contracts by means of non-national regulations (Poudret et al., 2007). It has been emphasized in this regard that the exertion of the principles of international commercial contracts depends on the place of the case trial, national courts or arbitral courts (Klabbers and Piiparinen, 2013) and, in arbitral courts in case of the parties' silence, the parties' will is usually inferred as not selecting the national regulations. In fact, since the arbitral courts usually give the priority in their trial of the parties' disputes to the finding of the most appropriate solution for the effective management and adoption of proper decision for the filed lawuit and do not find themselves obliged to the observance of the rules of place like the national judges, they, considering their nongovernmental features, have more freedom of action in accepting the trans-governmental jurisdiction of Lex Mercatoria.

In fact, since Lex Mercatoria is comprised of the customs and procedures of the merchants and the other resources suitable for the administrating of the international commerce, it, in comparison to the national regulations and international law, is considered more appropriate by the merchants.

The other point that should be taken into consideration herein is that the tendency towards the implementation of Lex Mercatoria or the very transnational commercial law is important also in that the rules and principles of Lex Mercatoria that are originated from merchants' procedures in resources specific to the international commerce have been adequately specialized in various branches of business by standardizing private institutions like international markets and, in this regard, the practical procedures and knowledge have been successfully mixed in Lex Mercatoria.

In an investigation of the nature of Lex Mercatoria, the concept and nature of it should be firstly examined and the resources forming this legal system should be explored in a second stage, as well, and, eventually, it has to be considered that why the arbitral courts, assuming the parties' silence, have preferred in some files to, instead of resorting to national regulations, substantiate their rulings on Lex Mercatoria as the general principle of international commercial principles shared by the majority of the legal systems.

Proposing the Theory of Lex Mercatoria:

The discussions about the nature of Lex Mercatoria are still being continued even amongst its proponents despite the passing of over half a century from the proposing of the topics about it (Frick, 2001). Described as a third legal system, Lex Mercatoria has been such various names as transnational law, transnational commercial law, Lex Mercatoria and international contracts law in the legal literature. Some writers, as well, consider Lex Mercatoria as a trans-governmental, instead of transnational, legal system according to its trans-governmental characteristics and with an emphasis on the nongovernmental nature of the principles constituting it and believe that it is better to use the term "trans-governmental" in lieu of "transnational" for describing the merchants' law hence Lex Mercatoria is envisioned as a trans-governmental commercial law (Karimi, Kashani and Nassiran, 2016). Supporters of Lex Mercatoria believe that Lex Mercatoria is reflective of a spontaneous expression of mores and principles stemming from business activities during long years (Campbell, 2010).

It was Lord Jessup who for the first time used transnational law for describing Lex Mercatoria and claimed, in this regard, that Lex Mercatoria includes rules regulating the actions and events transcending beyond the national borders and it encompasses both the general and private international law as regulations that cannot be appropriately grouped with such standard sets in a perfect manner.

Professor Good relates the concept of transnational commercial law to the transnational law concerned with commercial subjects and reasons in this regard that the transnational law also embrace national regulations

[6] ICC 7375/1996, ICC 7110/1995, ICC 7375/1996, ICC/ 8502/1996, ICCL9875/1999, ICC 10422/2001.

on international commercial and regulations of law conflicts. According to Good, transnational commercial law are not considered as the specified rules or products of a legal system rather Lex Mercatoria indicates the convergence of the regulations delineated in various legal systems that are even envisioned in the viewpoints of the interpreters who adopt more expanded approaches as collection of regulations that are completely non-national and forcible by virtue of the international customs and observed by the business society (Maniruzzaman, 1999). In another perspective, Lex Mercatoria is considered as a contemporary analogue of the medieval commercial law that have been employed by private actors in line with organizing the business and resolving of the business disputes. In fact, based on an old tradition in the comparative law, new writers have concentrated especially on the law of contracts and development of the international commercial arbitration. According to this perspective, the new commercial law is a complex combination of governmental and private authorities that, though being considered private, play a significant role in allocation of risks, regulating access to the market and creation of relationships between local and global territories. According to this perspective, Lex Mercatoria is a specimen of the new universal law the borders of which are considered as equal to the markets, professional communities and landless social networks (Snyder, 2004).

As held in this perspective, Lex Mercatoria is exercised in the professional borderless communities the relations of which are based on the commercial procedures and rites and rituals practiced by the merchants in international level for its being rooted in Medieval era and based on the merchant's needs for arranging their business relations and considering the growth and development of arbitration as a mechanism of nearly private dispute resolution[7]. In another perspective, Lex Mercatoria has been recounted as a transnational legal system composed of international commercial customs and shared principles and mores of the advanced nations (Winnick, 2014). Professor Goldman, as one of the stubborn defenders of Lex Mercatoria, knows this legal system as a set of general principles and customary regulations that have been spontaneously referred to or expanded within the framework of the international trade not specifically referred to a given national legal system (Maniruzzaman, 1999).

Therefore, according to Goldman, Lex Mercatoria is a nongovernmental independent legal system that is consisted of a spontaneous general principles and customary regulations without the interference of governmental legislation. Judge Mastil reminds in this regard that the regulations of Lex Mercatoria possess normative values independent from any national legal system and, based thereon, Lex Mercatoria forms an independent legal order (Lowenfeld, 1990). It is reasoned in this regard that the commercial traditions and business norms can be considered as transnational legal resources. Such a possibility comes about for the fact that they are not dictated by any governmental authority like parliament or judicial or governmental executive powers rather they are commercial rites and rituals and customs created by private persons based on the principle "autonomy of the parties". Therefore, the transnational law, as self-driving law, are born from international commercial procedures the resources of which are laid on the foundation of business norms and the dispute resolution method in its jurisdiction is also international arbitration considered different from the national or international courts (Gimenez, 2012).

As it can be observed there is an essential discrepancy in regard of the conceptualization of Lex Mercatoria. Some writers know Lex Mercatoria as solely a customary spontaneous nature and indeed a nongovernmental system the jurisdiction of which is even independent from the national legislation taking place even in the area of international trade. On the contrary, another group of the writers realize Lex Mercatoria as including governmental or inter-governmental regulations allocated to the international trade.

As for the reasoning by the first group, Goldman is one of the most prominent supporters of this perspective. According to Goldman, "Lex Mercatoria includes statutory provisions that are substantially, however not

[7] For seeing the reasons of the fast development and growth of a global business law order with a unique nature in comparison to the other noncommercial areas like criminal law or the family law, please refer to an article by Professor Bryan H. Druzin that can be retrieved from the following address: Bryan H.Druzin, "Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Legal Order is Emerging", Vanderbilt Journal of Transnational Law, Vol. 47, 2014.

exclusively, transnational and rooted in customs hence they are spontaneous even with the likely governmental or intergovernmental interferences for their expansion and implementation". Keeping this in mind, Lex Mercatoria can be envisioned as a sort of transnational customary law.

With the arrangement of such standards as customs, transnational principles and spontaneity, Goldman has in fact adopted a meager perspective towards such masters like Judge Jessup, Clive M. Schmitthoff and Ole Lando. In fact, Goldman believes that the intergovernmental regulations or those sourced from governmental origins related to the international trade are not automatically considered as part of Lex Mercatoria; however, he also suggest it that the regulations that have come about in line with the law's customary status through practical repetition (or frequency) or reflect the international mores or the general principles of the law can be considered as part of Lex Mercatoria without considering the constructors of these regulations or rules (Maniruzzaman, 1999).

With all these discrepancies, Professor Berger, in his important book titled "creeping codification of Lex Mercatoria" in 1999, offers a real description of the nature of Lex Mercatoria.

In this regard, Berger states that the perspectives are widely diverging about the terminology and legal quality of Lex Mercatoria, especially in respect to its nature as a third legal system at the side of the domestic law and general international law. However, there are strong similarities in terms of turning points of all the theories in international commercial law: combination of a panorama of the comparative law, customs, rites and rituals and business procedures has led to the perfection of transnational principles, regulations and standards that have been in practice exerted for the achievement of rational economic solutions in respect to the transnational commercial differences.

In this method, the priorities in contrast to substantive legal solutions have been reflected in line with avoiding the effects of uncertainty and unpredictability of the results stemming from complicated exertion of the regulations conflict doctrine and from the substantive regulations of the domestic law that are mostly insufficient for resolving the legal problems related to contemporary international commercial law (Pryles, 2008).

Based on this perspective, Lex Mercatoria, disregarding all the discrepancies in the definitions and its nature, is considered as a legal system the principles and regulations of which are transnational and/or established based on the rites and rituals and common procedures of international trade and they can also be found in a comparative investigation of the general common principles between the majority of the national legal systems, as well, and these principles have been created and developed for achieving a rational commercial solution for the discrepancies proposed in international commerce.

From this perspective, Lex Mercatoria is a legal system the principles and regulations of which have been accepted by the international commercial procedures and confirmed by the majority of the legal systems and it is considered more appropriate as compared to the domestic regulations due to its repetition in the international commercial procedure and, in fact, for its principles and regulations being considered as value and norms by the society of merchants in line with administration of the international commercial contracts.

It is worth mentioning that the arbitrators have daily increasingly explicitly and extensively utilizing Lex Mercatoria in the international commercial relations and, under such conditions, even if we, theoretically and/or motivated by the preservation of the national interests and expansion of the domestic law' inclusion circle, come to terms with the governance of the law of a given territory and deny the transnational commercial law and, then, relying on the idea that these regulations lack any sort of indispensability, avoid accepting them as legal regulations, we never can and should deny the truth that the transnational commercial regulations are widely used and substantiated by the arbitrators as "legal realities" (Iranpour, 2015).

Resources of Lex Mercatoria:

As it was mentioned, there are different perspectives regarding the nature of Lex Mercatoria. They are somewhat rooted in the absence of a unit perspective regarding Lex Mercatoria resources. In fact, one cannot

witness offering of a unit definition of Lex Mercatoria even with perspective differences about resources of Lex Mercatoria as natural elements and bodies of this legal system.

The discussions about the determination of the resources of Lex Mercatoria and the relative importance of its resources have become prevalent amongst the supporters thereof, as well. Professor Ole Lando lists several elements, instead of resources, for Lex Mercatoria, including:

- General international law
- Uniform regulations
- General legal principles
- Regulations of the international organizations
- Commercial rites and rituals and procedures[8]
- Standard conventions
- Reported arbitration sentences (Pryles, 2008)

Another author, asserting the disagreement regarding the resources of Lex Mercatoria even amongst the most passionate proponents of this legal system, generally considers four common elements for it, including:

- General legal principles
- Business rites and rituals and principles
- Uniform regulations and international commercial principles
- Arbitration sentences

Another professor, asserting the absence of a standard definition of the set of the regulations and principles exerted in respect to the international contracts, classifies the resources most often mentioned for such transnational law as outlined below:

1) Customs;
2) General legal principles;
3) Soft law that points to the resources lacking the binding force rather they are rendered indispensable for the parties via considering them in the area of voluntary volition of the parties for enforcing them;
4) General principles of the general international law;
5) In some of the cases, as well, national and international resources (like pacts and conventions) to the extent they are deemed regulating the international commercial activity are mentioned in a more extensive definition plus the above-mentioned cases (Cordero, 2014).

Therefore, there is no single perspective about the resources of Lex Mercatoria. The absence of a unique perspective about the resources is rooted in the idea that there are essentially two different approaches about what has constituted Lex Mercatoria. These two perspectives approach Lex Mercatoria in both an expanded and a narrow look.

The proponents of the narrow approach underline such characteristics of the resources of Lex Mercatoria as their being spontaneous and non-statutory hence they exclude the international conventions and uniform regulations. The emphasis of this group is on the non-national trait of Lex Mercatoria and, resultantly, the international conventions and uniform regulations cannot be considered as part thereof. Based on this reasoning, none of the national rules and regulations or general international law can be considered as part of Lex Mercatoria.

On the other hand, there is made a lower stress on the spontaneity and customary nature of the resources in a more extensive approach to Lex Mercatoria, though it is defined as a transnational commercial law. According to this perspective, all the enforceable regulations in respect to the international commercial relations are part of Lex Mercatoria. In line with this, it has been remarked that the international trade

[8] Professor Bhala believes that the rites and rituals can be considered as source of Lex Mercatoria under conditions that a) they reflect the business manners or habits and market mores; b) they have been continued in a considerable temporal period; c) they are global; d) they have external origins in respect to legal system; e) they are highly profitable for the business society (to wit they should promote maximum industry or consider a bigger goal for a larger number of businessmen: Maniruzzaman, Ibid, p.672.

follows different regulations in respect to its domestic business activities and the international commercial society regulates its own affairs and creates its own regulations. This internationally uniform law saves confrontation with the conflicts in the national regulations. Corresponding to this extensive conceptualization of Lex Mercatoria, international conventions, uniform regulations, general legal principles, codes of conduct, rites and rituals and customs, standard form contracts and international organizations' regulations are parts of Lex Mercatoria.

Critics reason in line with the idea that it is via appending and authentication of some of the resources of Lex Mercatoria by the governments that these resources are not considered as part of Lex Mercatoria rather they are envisioned as the sources of national regulations.

The recent theory cannot be sufficiently identifying. In fact, how an axiom can be separated from the body of a certain legal system and entered a given national law solely via appending? The fact of the matter in this regard is that a maxim, as part of Lex Mercatoria, is not excluded from the domain of Lex Mercatoria via providing it with the ability of being appended into the national regulations. Moreover, many of the general principles of Lex Mercatoria have also been considered in the majority of the national regulations, as well, because these regulations reflect business considerations and fair behavior for them and they are considered as important regulations for fluid and transparent commercial performance under any legislation (Baddack, 2005).

It seems in this regard that all the regulations, principles and regulations that feature transnational nature and appropriate for international commercial relations and promotion of commercial business, as well, and accepted in the international commercial procedure and the majority of the national legal systems are considered as parts of the body of Lex Mercatoria and its source though being even part of the national regulations. The emphasis on the spontaneous nature of Lex Mercatoria is not contradictory to the issue that its resources like the general legal principles are also found in the countries' national regulations rather the authentication of the general principles can somehow signify the extensive acceptance of the principles and regulations of Lex Mercatoria amongst the majority of the national legal systems that is per se indicative of the trans-governmental characteristic of these principles.

However, the sure thing is that a principle or legal axiom or a convention that is exercised amongst a few number of the countries and accepted by the majority of the international commercial society and, in other words, is not common and customary amongst the international commercial society cannot be considered as part of Lex Mercatoria. So, it seems that the judge or arbitrator trying a case, assuming having being granted the authority of administrating the contract based on Lex Mercatoria, should, in the position of identifying the principles and rules of this legal system, pay attention to the transnational trait or, in other words, trans-governmental nature of these principles as well as to the agreeability and commonality of them in the international commercial society and in the majority of the national regulations, as well. In line with this, the arbitrators usually identify and implement the common principles and regulations of international trade through a comparative investigation and according to the original resources of Lex Mercatoria like the international arbitration procedure and commercial mores and rites and rituals.

Lex Mercatoria in International Commercial Arbitration:

Some of the national legal systems make use of the term "state law" for the dispute parties to disregard the possibility of selecting Lex Mercatoria for the administration of their contract as a collection of the transnational principles and regulations. However, such a possibility has been taken into account in some legal systems[9] by the use of the phrase "the rules of law". In fact, many of the interpreters are of the belief that when a national legislator considers the possibility of selecting the rules of law for the administration of parties' contract, he has implicitly authenticated and confirmed the possibility of selecting a nongovernmental system as Lex Mercatoria for the administration of a contract. Generally, since some of the national legal

[9] France, Switzerland and the Netherlands.

systems do not support in the light of positivism tradition[10] of the law-making by the private trans-border communities, Lex Mercatoria is more enforceable and substantiated in comparison to state courts in international commercial arbitration. In this respect, it is more generally accepted as a reality that Lex Mercatoria and international arbitration are directly associated with one another. The majority of the contracts and regulations related to international arbitration that have been prepared after 1950 consider the idea that the arbitrators should take into account the principles and regulations of the international trade even if they have not paragraph indicating the reference to Lex Mercatoria (Güçer, 2009).

In this regard, the arbitrators played essential roles in the growth and development of Lex Mercatoria since the arbitrators realized Lex Mercatoria as more suitable in contrast to the national regulations of the dispute parties or the law of a third state and succeeded in issuing sentences based thereon with the authorities they gained from the parties' private contracts and according to their not being required to observe the governmentally stipulated arbitration regulations[11] in some of the lawuits even with Lex Mercatoria's not being selected as the law governing the contract by the parties[12].

Furthermore, the arbitrators enjoy more creative power in comparison to the national judges and can, like social engineers, play a constructive role in finding the principles of Lex Mercatoria and proper designing of them in respect to the dispute parties' discrepancies. In this regard, Professor Lando points to the creative role of the arbitrators in developing Lex Mercatoria by expressing that: "the parties to a contract filing a lawuit to international arbitration do not sometimes agree on a certain national law for the administration of their contract and, instead, select the rites and traditions and mores of international trade for the fact that they are more commonly shared by all or majority of the stages engaged in international trade or by the states connected with the dispute. Where such regulations cannot be (easily) justified, the arbitrator exerts an axiom and selects a solution which s/he thinks more appropriate and more just. This judicial procedure part of which lies in the enforcement of the legal regulations and another part pertains to the selection and creation or a certain procedure or trend is called Lex Mercatoria enforcement (Maniruzzaman, 1999).

Therefore, it can be opined that arbitration and Lex Mercatoria are two supplementary parts of the general international commercial law. Arbitration considerably contributes to the supplementation of Lex Mercatoria that is essentially evolved from the theories and procedures of arbitration and considered as the substantive indicator of private international judgment. In fact, arbitration is envisaged as an imperfect institution without Lex Mercatoria. Equally, Lex Mercatoria can bloom inside the framework of arbitration and find its proper position (Bagheri, 2000).

In this sense, the relationship between arbitration and Lex Mercatoria is a direct and undeniable one and, in fact, the necessity for this relationship should be sought in the trans-governmental trait of Lex Mercatoria and the private nature of the international arbitration; thus, the combination of these two characteristics, provides a proper environment for the administration of international contracts via considering the evolving conditions of international trade.

Another noteworthy point is that a legal phenomenon is not always in need of resorting to the court and judicial enforcement. A contract might be negotiated, drafted, endorsed and implemented without the interference of any judicial authority. However, in case of the occurrence of problems the resolving of which is deemed improbable through negotiation, the parties need to refer to an impartial authority for judging the subject of dispute. In this regard, it has to be noted that the need for a neutral authority only comes about in the second stage of the legal phenomenon's emergence. In such cases, the parties normally need a qualified national judge for judging their case. The performance of judicial domain is one of the necessary indicators of

[10] Positivism refers to the legitimacy of the creation of the law solely by the governmental-state systems and does not consider legitimate the construction of law by the private institutions.

[11] Except the regulations that can cause flaws in the credibility of the arbitral sentence.

[12] As an example, in the file no.4650, in 1987, the International Chamber of Commerce (ICC) Arbitral Tribunal decided to accept and enforce Lex Mercatoria in the absence of the selection of the governing law by the dispute parties.

a modern government wherein a branch of the government, named judicature, becomes responsible for implementing and enforcing the law enacted by another branch of the government named parliament.

Using arbitration, contracting parties, as citizens of these states, may use arbitration to bypass the national judges' legal power and, consequently, dodge the state's judicial power. In this regard, the nature and the legitimacy of the international arbitration were questioned for a long time. However, nowadays, the national regulations, international conventions and the decisions by the most supreme courts worldwide consider arbitration as a credible method for resolving the discrepancies and give arbitration a type of "jurisdictional" function.

International arbitrators enjoy a larger deal of flexibility as compared to the national judges parallel to guaranteeing the law enforceable in respect to the nature of the dispute because the arbitrators are not generally committed to the enforcement of dispute resolution regulations of the arbitration place[13]. In this regard, the international arbitration regulations of the international chamber of commerce (ICC), the UNCITRAL example law in the international commercial arbitration and the national regulations arranged after the UNCITRAL example law explicitly grant the arbitrators a wide authority for determining the law enforceable on a contract (Gimenez, 2012).

The assigning of such a vast authority stems from the private nature of the arbitration and in respect to the principle of the parties' independence and the power that the arbitration parties grant to the arbitral tribunal for the proper administration of their contracts. This characteristic of arbitration versus the domestic judges who represent the states employing them has caused the arbitrators to consider the needs of international trade and the environment of the creation and enforcement of international commercial contracts through their creative power and freedom of action and, in line with this, in the position of selecting between the domestic regulation options that would naturally lead to the enforcement of national conflict resolution regulations and Lex Mercatoria as a transnational legal system consider the latter as more qualified for the administration of the international contracts in some of the cases.

Enforcement of Lex Mercatoria by Arbitrators:

Arbitrators enforce Lex Mercatoria on various occasions. Apart from the situation that the parties explicitly agree on the enforcement of Lex Mercatoria for their contracts, the arbitrators perceive in some cases according to the contract conditions such as the ones excluding the enforcement of the domestic law that the parties have intended the enforcement of Lex Mercatoria by their mentioning of such conditions. In this regard, it has been stated in some cases that although the possibility of enforcing Lex Mercatoria might have not been explicitly mentioned in the contracts, they might have been arranged in such a way that the possibility of enforcing Lex Mercatoria can be inferred from the conditions therein. One such a condition is the explicit denial of enforcing any domestic law and stipulating the exclusive enforcement of the general principles and customs of international trade (Janidi, 2012). The proponents of Lex Mercatoria reason in many of the international arbitration cases that the arbitrators are willing to enforce more flexible and more popular regulations in lieu of overly legal methods (Newman and Burrows, 2013).

In some cases, as well, the arbitrators choose Lex Mercatoria as the best option for the administration of their contracts in the absence of the selection of any law by the parties. For example, the international commercial court announced in a file[14] that "the plaintiff has declared that the paragraph related to the enforceable law has not been taken into account intentionally because an international institution would not consider the contracts under any national legal system". Thus, according to this arbitrator's ideas, contract should be exclusively administrated by the generally accepted principles in transnational level.

[13] For instance, it is expressed in file no.5321, in 1974, adjudicated to arbitral tribunal of ICC in line with disregarding the regulations of dispute resolution that "it is not necessary for the conflict resolution regulations to be determined. The arbitral tribunal generally decides according to the acceptance of the international arbitration independence to resolve the dispute corresponding to the general principles of contract laws that are well-justified in procedures of the arbitration courts".

[14] ICC Award No. 2152/1972, cited in: Journal du Droit International (1974).

In sentence no.1875 by ICC's arbitral tribunal, as well, the arbitrator decided on the enforcement of Lex Mercatoria, including Unidroit principles in the absence of the enforceable law selection by the parties.
One of the most important decisions related to the enforcement of Lex Mercatoria was made by the arbitral tribunals where the parties had fallen short of selecting the law governing their contract, i.e. in Pabalk vs. Norsolor case in 1979.
In Norsolor case, the Turkish plaintiff claimed loss compensation for the breach of agency contract against a French defendant (Ashenfelter and Iyengar, 2009). In sentence no.3131/179, the arbitrators expressed in the decision made for the dispute resolution that: "in trying the problems related to the selection of the law and in line with the enforcement of a law that is sufficiently fascinating and convincing and according to the international nature of the law, the arbitral tribunal realized it more appropriate not to refer the case to a certain legislature, Turkish or French, and took measures parallel to the exertion of international Lex Mercatoria".
In this file, the arbitral tribunal also reasoned that "one of the important and key regulations is the principle of good will that should administrate the formation and enforcement of the contracts and, additionally, realized it necessary to relate the (parties) behavior with the general principle of responsibility" (Jemielniak, 2016).
In the end, the arbitral tribunal reasoned based on Lex Mercatoria that the good will commitment has been violated by Norsolor hence it sentenced the French company to the payment of eight hundred thousand French Francs (Alfons, 2010).
In file no.9474, in February 1999, as well, ICC's arbitral tribunal decided the enforcement of CISG as one example of Lex Mercatoria. In line with this, the arbitral tribunal expressed that "even assuming that the CISG contract parties have not selected the law governing their contract, CISG can be considered as a standards and regulations source of the international contracts". The other resources of such standards and regulations can be inferred from the principles of the law on European contracts and Unidroit principles, as well (Lassila, 2017). In verdict no.8502, as well, that was issued by ICC, the arbitral tribunal, in Paris, that was dealing with the dispute between a Vietnamese seller and a Dutch buyer asserted that the reference to incoterms[15] and UCP500[16] in contract shows the parties' intention for administrating their contracts by means of the mores and rites and traditions of the international trade (Petsche, 2017).
The abovementioned examples that are considered as samples of sentences issued based on Lex Mercatoria indicate that the arbitrators, even assuming that Lex Mercatoria has not been selected as the law governing the contract in some lawuits, prefer to enforce Lex Mercatoria as a collection of transnational principles shared in the international commercial procedure and between the majority of the national legal systems in lieu of resorting to the dispute resolution regulations of the arbitration place and, finally, administrating the contract based on a given national law. The supporters of Lex Mercatoria reason that the language of Lex Mercatoria is formally universal and that it provides a legal format for what has been considered necessary for the business customs hence they underline its legitimacy for making decisions in arbitrations in this regard (Mattli and Dietz, 2014, p.115).

Conclusion

Although Lex Mercatoria as a third legal system along with the domestic and international law has been exposed to numerous theories and perspectives of the international commercial law professors in terms of its nature and resources constituting it and there is no unitary definition posited for such a transnational legal system, the absolute point is that this is needed in respect to the merchants and the conditions and

[15] Incoterms refers to the international commercial expressions prepared and codified by the international chamber of commerce.
[16] Regulations of UCP500, passed in 1994, and UCP600, passed in 2007, are the ones governing the documentary credibility.

environments of the signed contracts of the international trade to highlight the necessity of considering a system stemming from international commercial-specific resources for the society of merchants in the light of the domestic law' deficiencies and problems arising from the regulations on resolving rules' conflict. In line with this, arbitration played a distinct role as an independent institution and succeeded in investigating the conditions and expediencies of each file in the light of the principle of the governance of will and according to the independence and creative power of arbitrators as the representatives selected by the contracting parties; and, if the parties happened to find Lex Mercatoria more appropriate for the administration of the contracts than the national regulations even in case that the dispute parties fell short of selecting it, arbitrators took steps in line with selecting and enforcing Lex Mercatoria in respect to the parties' contract. In fact, the arbitrators, unlike the national judges who formally represent the states installing them, are not required to follow the rules of the place of trying the dispute and it is in this regard that they have been able to authenticate Lex Mercatoria in the light of bearing witness to the inefficiency of some of the national regulations for the trial of the proposed disputes in international commercial level thereby to take valuable steps towards the creation and development of Lex Mercatoria.

It has to be noted in this regard that more than ninety percent of the contracts signed in the area of the international trade currently contain an arbitration paragraph and, in this regard, the arbitral judgments, as one of the original sources of Lex Mercatoria, feature a high frequency rate in the international trade. According to the creative power of this method of dispute resolution and considering the arbitrators' strict adherence to Lex Mercatoria as a system matching with the international commercial conditions, more blossoming of Lex Mercatoria through international arbitration can be seen in future. The thing that should not be forgotten on this path is that it is not easy to leave behind the traditional law perspectives that only assign the power of constructing and creating law to the governments and national governance in the light of positivism theories and do not envision such a power as being legitimate for the private communities like the society of the merchants and, in this regard, longer time is needed to be passed so that the nature, resources and, consequently, the principles and regulations of this trans-governmental legal system that is needed by the society of international merchants can finish its evolution route.

It has to be reminded that Lex Mercatoria resources possess the required dynamicity for taking this evolutionary path and, in this regard, it can be stated that Lex Mercatoria is becoming more perfected and more developed with the pass of time.

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