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The Impact of International Commercial Customs (Lex Mercatoria) on International Commercial Arbitration

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Abstracts

Lex Mercatoria play a crucial role in resolving disputes arising from international trade contracts before arbitration bodies, thus establishing them as an independent legal system capable of regulating international commercial relations. This legal characteristic imposes a certain obligation on various arbitration bodies to apply them to the disputes brought before them, either based on the parties' intentions or based on the legal force inherent in those customs. Consequently, this research examines the extent of recognition of the binding force of commercial customs before arbitration bodies, and based on that, it elucidates the authority of these bodies in applying them to international trade disputes. It is evident that these customs, due to their flexibility derived from the nature of commercial transactions and the customary practices of traders resorting to them, have become today an independent legal system that imposes itself on arbitration bodies even if the parties did not choose to apply those customs. This paper recommends the Jordanian legislator to explicitly adopt the application of these commercial customs in the Jordanian Arbitration Law texts, following the example of national and international comparative legislation.

Keywords: Lex Mercatoria, International Substantive Rules, Choice of Non-National Rules, International Commercial Arbitration.

Introduction

The evolution of international commercial relations necessitates the development of flexible legal frameworks that align with the nature and specificity of rapidly advancing commercial transactions. Relying on the conflict-of-laws approach in private international law does not offer suitable solutions for this type of relationship, as it ultimately leads to the application of national legal rules specifically designed to regulate internal relations between individuals, disregarding the specificity of international commercial relations. Hence, there arises a need to establish an objective legal system comprising a set of non-national legal rules dedicated solely to regulating

various aspects of international trade, thereby promoting it and respecting the legitimate interests of its parties. These objective rules draw from multiple sources, notably international agreements, general principles of law, and international commercial customs. The international community today witnesses a wide movement, represented by institutions, bodies, and organizations, towards establishing unified legal rules directly governing international commercial relations.

In the same context, the emergence of these non-national rules such as commercial customs and others to govern international trade transactions is closely linked to the rise of arbitration as a means of resolving commercial disputes. Unlike national judges, arbitrators can liberate themselves from all national judicial restrictions and procedures, as well as from the application of national conflict-of-law rules that would lead to the application of domestic legal rules incompatible with international commercial relations. Arbitral tribunals can resort to applying legal solutions with an international origin, reflected in the selection of international commercial customs and their application to disputes arising from international trade contracts. This approach is the most suitable for this type of contract and the most effective. Hence, the significance of these customs emerges as they represent a direct objective means or solution that arbitral tribunals resort to in resolving international trade disputes, given their high flexibility that aligns with the nature of commercial relations.

Hence, most national and international legislations have granted arbitral tribunals this authority due to the stability such application of rules achieves in transactions and the enhancement of the principle of legal certainty among the parties involved in the commercial transaction. This was emphasized by the Jordanian legislator in Articles 3 and 36 of the Arbitration Law of 2018, stressing the necessity of considering international commercial customs by arbitrators when determining the applicable law to the disputed transaction.

Therefore, this research paper aims to introduce international commercial customs and practices and their importance in the context of resolving commercial disputes before arbitral bodies. Additionally, it seeks to elucidate the extent of authority vested in these bodies to apply international commercial customs, drawing upon provisions outlined in national and international comparative legislations. This will be achieved through the following structure:

1. The Nature of International Commercial Customs and Practices.

2. The Role of International Commercial Customs and Practices in International Commercial Arbitration

The Nature of International Commercial Customs and Practices

Commercial customs represent one of the oldest rules relied upon for the resolution of commercial disputes. International commercial customs have constituted a venerable and significant source of law, as custom precedes the emergence of other legal sources historically. People's behavior and customary practices in transactions acquired binding force until societies began to codify and formulate customs into written rules. Nevertheless, commercial customs continue to serve as an important source for commercial transactions and as an outlet for judges

and arbitrators in many disputes to navigate away from the rigidity often associated with written legislation, seeking solutions that align with the rapidly evolving nature of commercial activities. Consequently, it is imperative to define the concept of international commercial customs and practices and subsequently clarify their legal adaptation and enforceability.

A. Definition of International Commercial Customs and Explanation of Their Sources

International commercial custom stands as one of the most significant sources from which international trade law derives its provisions and regulations. It is considered the oldest system recognized by societies, capable of adapting to various forms of international trade, regardless of their evolution and expansion. These customs can be defined as the rules followed by traders in commercial transactions, with the belief in their obligatory nature until they are established as mandatory rules deserving of respect (Berger 1999, P.39). They are uniform material practices that have emerged from the international business community, meaning they are the practical practices that practitioners in a specific profession or trade have become accustomed to following.

Thus, custom is based on both a material foundation, represented by the habitual adoption of a specific behavior over a long period of time and in a regular and consistent manner (Ibrahim 2002, p. 260), and a moral foundation, represented by the sense of obligation and necessity felt by practitioners to follow and apply this custom, along with the understanding that deviation will inevitably result in financial penalties (Aldawoodi 2004, p.157). Consequently, with the presence of these foundations, custom is considered a binding legal principle akin to legislation, and therefore it cannot be violated without the imposition of penalties, nor can ignorance of it be excused (Kareem 2013, p.78). Hence, commercial customs are described as unwritten practical laws, as they are a creation of those subject to them. Thus, they reflect their desires and way of life. Even jurisprudence has recognized custom as the most accurate expression of what society members deem necessary for regulating their relationships (Alfar 1999, p. 88).

In discussing the sources of international commercial customs, these customs are drawn from several sources, including model contracts, general conditions, the International Chamber of Commerce (ICC) rules for interpreting international commercial terms (Incoterms), general principles of law, provisions of international commercial arbitration, and rules of specialized trade organizations (Craig, Park & Paulsson 2000, p. 45; Najoud 2021, p. 30).

Model contracts are defined as pre-written documents or prepared forms that parties can use as standalone contracts. They are formulated by trade associations and professional unions after categorizing contracts into categories (Walid 2021, p. 44). The model contract was developed through activities that were It occurred in the merchant community and eventually led to the emergence of international trade customs (Njoud 2021, p. 30).

As for the general conditions, they refer to contractual provisions incorporated by traders into their agreements, representing an understanding among these traders regarding specific goods within a designated region. They commit themselves to the terms of deals struck between them (Shafiq, without a year, p. 10), a factor that transforms these terms into familiar conditions within commercial norms, thus contributing to the development of practices that later evolve into customs (Al-Zaqrud 2007, p. 55).

Additionally, the international rules for interpreting terms of international trade (Incoterms) play a significant role as they serve as a self-defining tool for contracts through concise formulations. This not only saves time and effort for traders and negotiators in protracted discussions but also aids them by providing concise terms to define the parameters, principles, and elements of economic transactions or deals. The continuous use and circulation of these terms across various regions further underscore their importance, with traders increasingly recognizing their binding nature, leading to the emergence and development of commercial customs (Fouchard, Gaillard & Goldman 1999, 1446; Najoud 2021, p. 32).

It is worth noting that some jurisprudences consider international commercial norms to be rules or principles that are defined, compiled, or organized into a list, and updated from time to time (Berger, 1999). An example of this is the list prepared by Lord Mustill, which includes 20 principles, such as the principle of pacta sunt servanda, the principle of non-performance of unfair contracts, and other principles (Mustill 1988, p. 65). Similarly, there is the list compiled by jurist Berger, which comprises 78 principles, such as the reception of general principles of law, the codification of international trade law by 'formulating agencies,' and the case law of international arbitral tribunals (Berger 1999, P.44). Professor Berger's list comprises a number rules or principles of which are shared with Lord Mustill's list.

On the other hand, some argue that international commercial customs are not just principles or rules listed in isolation; rather, they represent a method for identifying the appropriate rule or principle based on extracting the objective solution to the legal problem through analyzing comparative law, relying on principles referenced in previous lists, what is established in international arbitration rulings in disputes over international trade contracts, and based on international treaties related to international trade transactions, as well as specialized research and studies in this field (Gaillard 2000, p. 59).

Thus, after having clarified the concept of international commercial customs referring to their sources, we proceed to discuss the legal adaptation of commercial customs.

B. Legal Adaptation of International Commercial Customs

The legal nature of international commercial customs has been a subject of prolonged debate, focusing on attributing a specific character to this corpus of enduring and standardized practices, especially concerning their binding authority. Initially, a jurisprudential trend emerged that rejected recognizing the binding nature of international commercial customs and thus refused to confer legal status upon them (Alomar 2021, p. 174). According to this trend, international trade law is not fundamentally a legal system, as it is not independent of other legal systems, and its rules do not constitute a legal system. This trend emphasized that a legal system is not merely a set of legal rules but requires two additional elements: society and the authority ensuring the preservation and continuity of this system. Therefore, the existence of a legal rule outside the framework of the state, with the penalties it imposes for violating the laws, is inconceivable. A rule that is not associated with the means of general deterrence cannot be called a legal rule. (Fouchard, Gaillard & Goldman 1999, p. 802); (Najoud 2021, p. 144).

However, this previous trend no longer carries sufficient weight to refute the binding nature of international commercial customs. The binding character indeed arises from the contractual and

legal nature of these customs. Imbuing these customs with a contractual nature endows them with the force of obligation in application between parties and before the arbitrator, who is bound by the rules imposed by the parties to govern their contracts (Lowenfeld 1990, p.133). On the other hand, it is widely agreed in jurisprudence that model contracts and general conditions are not binding unless explicitly or implicitly agreed upon by the parties. Therefore, the arbitrator applies them not as contracts or general conditions but as customs and international principles. Model contracts and general conditions serve merely as evidence of the content of customs and international principles (Ibrahim 2002, p. 256). Thus, there is consensus that these customs and general principles are independent rules separate from domestic legal systems and the general international legal framework (Fouchard, Gaillard & Goldman 1999, p. 809).

In light of the foregoing, we mentioned that the main reason contributing to the emergence of these international customs is that contracts with an international contractual nature have granted those customs a degree of independence within the legal system that governs them. This has led to the emergence of standardized international customs, which are considered established rules, through international commercial customs in various international sales transactions. These transactions were initially conducted in model contracts and general contract conditions. Soon, these customs gained rapid acceptance as they efficiently addressed most of the legal issues arising from these international contracts (Alomar 2021, p. 178).

Regarding the legal binding nature of commercial customs, this characteristic is acquired by these customs through recognition and widespread usage of such commercial practices among traders in the commercial environment to which they belong. Consequently, these customs become a binding legal system for them in their commercial transactions. With this attribute, commercial customs have become self-imposed in application before arbitral tribunals, which widely apply them. This has strengthened the consideration of these customs as an independent legal system separate from national legal systems. (Najoud 2021, p. 112).

Hence, the jurisprudence supports the attribution of the binding and legal nature of commercial customs relies on the premise that these commercial customs regulate and govern relationships among individuals belonging to a specific social milieu governed by institutions and professional bodies with authority and influence. Therefore, international commercial customs are deemed to acquire the status of legal rules with a non-legislative customary origin. This is evidenced by the decision of the Lebanese Supreme Court issued on April 4, 1968, which applied the specific rules regarding documentary credits, stating that the contract arising from a documentary credit is based on international commercial customs recognized by all courts worldwide without the need for national courts to cite them. (Najoud 2021, p. 146).

In the English case of Deutsche Schachtbau-und Tiefbohrgesellschaft v Ras Al Khaimah National Oil Co enforcement of a foreign award was resisted on the ground that the tribunal had chosen as the governing law a common denominator of principles underlying the laws of the various nations governing contractual relations. The court decided that this did not affect the enforceability of the award in England.

Therefore, it can be said that the binding nature of commercial customs derives from both their contractual nature and their legal character, as evidenced by their widespread usage before

arbitral tribunals, thereby establishing them as an independent legal system separate from other legal systems imposed by the state. There is no doubt that conferring the binding nature on commercial customs will impact the effectiveness of their application before arbitral tribunals in commercial disputes, and consequently, the enforcement of arbitral awards and decisions before national courts, which will be addressed in the second section.

The Role of Commercial Customs in International Commercial Arbitration

Arbitration serves as a suitable judicial mechanism for settling international commercial disputes, as parties resort to arbitration to avoid the application of national laws with their complex solutions and procedures unsuitable for international trade. In order to enhance parties' confidence in arbitration, arbitral tribunals must establish legal rules capable of regulating international commercial disputes in a manner that promotes stability in legal relationships and serves the legitimate interests of the parties. Hence, it is crucial for arbitral tribunals to determine the applicable law, including international commercial customs, to govern international commercial disputes. What authority does the arbitrator have in determining and applying commercial customs and practices to international trade disputes? To answer this question, it is necessary to distinguish whether the parties have agreed to designate the applicable law (A) or whether such an agreement is absent (B).

A. Application of International Trade Customs and Practices Based on the Principle of autonomy of will

One of the most fundamental principles underpinning the arbitration system in the realm of international trade contracts is the respect for the parties' autonomy in choosing the legal rules applicable to various aspects of the arbitration process, whether they pertain to arbitration procedures or the subject matter of the dispute. The principle of autonomy of will before arbitration bodies is not established based on a conflict of laws rule specific to a particular state's law; rather, it finds its foundation before arbitration bodies in the existence of a substantive rule of private international law concerning international trade contracts (Pommier 1992, p. 213). The principle of autonomy of will has been affirmed in numerous resolutions issued by the International Law Association, such as the 1992 resolution regarding the principle of party autonomy in contracts between individuals, where Article 2 states that "the parties are free to choose the law applicable to their contract" (Clavel 2009, p. 87).

If the arbitrator finds that the parties have chosen a specific legal system to govern the subject matter of the dispute, they must respect that choice and apply the selected legal rules. This is affirmed by Article 36 of the Jordanian Arbitration Law, which states: "The arbitral tribunal shall apply to the substance of the dispute the rules of law chosen by the parties. If the parties agree to apply the law of a particular state, the substantive rules of that state shall be followed, excluding its conflict of laws rules." This principle is also reflected in Article 35 of the UNCITRAL Arbitration Rules, which provides that "the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute." The legal rules referred to in these provisions are not limited to national legal rules but also include non-national

legal rules, such as the principles of international commercial law (Fouchard, Gaillard & Goldman 1999).

This terminology was first used by the 1981 French decree on international arbitration, which provided in Article 1496 of the New Code of Civil Procedure that the parties (and, in the absence of a choice by them, the arbitrators) were free to select the 'rules of law' applicable to their dispute. Commentators were unanimous in recognizing the implicit reference to transnational rules in the text and the courts have never questioned that interpretation.

Respecting the arbitral tribunal's adherence to the parties' choice of applicable legal rules, including international trade customs enhances the role and significance of arbitration in resolving commercial disputes while also respecting the legitimate interests of the parties. National and international legislations have allowed the parties to choose neutral and flexible legal rules that align with the nature of commercial relationships. This is particularly evident in the parties' selection of international trade customs and practices.

It is noteworthy that the circumstances in which international trade customs and practices are applied by the will of the parties can be categorized into two situations: the explicit agreement to apply these customary rules, where arbitral tribunals can determine the applicable law on the subject matter of the dispute through the parties' agreement based on the principle of party autonomy. The explicit agreement to apply international trade customs and practices to disputes can be realized in several ways, such as agreeing to apply the international rules of lex Mercatoria. For example, in a case where an arbitration dispute arose between an Italian party and a Libyan party, the parties agreed that Libyan law would be the applicable law in principle, with the stipulation that if Libyan law could not be proven, the arbitral tribunal would apply the law of merchants or general principles of law. This illustrates the particularity of applying these rules through the explicit choice of the parties and their express reference to them (Ibrahim 2002, p. 358).

The arbitral tribunal under the arbitration system of the Paris Chamber of Commerce took this direction in its Decision No. 8365 issued in 1996, where it indicated the exclusive application of international rules without resorting to national laws. The tribunal ruled that the parties' reference in the guarantee contract to the application of general principles of international law and international trade customs provided a clear indication of their intention to exclude national law and apply international commercial principles and customs (Tarawneh 2020, p. 27).

These rules can be chosen implicitly in more than one context and in more than one form, including the following sentences in the various arbitral awards: "The applicable law to the substantive issues between the parties will be determined by the tribunal, taking into account the nature of the parties, the transnational nature of their relationships, and the prevailing principles and customs in the developed world" (Ibrahim 2002, p. 360).

Implicit selection of international customs may also occur when parties choose to submit to the legal framework of certain arbitration institutions. For instance, agreeing to apply the rules set by the International Chamber of Commerce in Paris (les Incoterms) can be seen as implicitly subjecting the dispute exclusively to international customary rules, considering the ICC rules as part of international commercial law and thus constituting international trade customs.

Conversely, some argue that the application of the customs prepared by the International Chamber of Commerce requires explicit selection by the parties (Didier and Sibille 1991, p. 39).

Therefore, it is noted that the arbitral tribunal is committed to applying the international rules and trade customs chosen by the parties, either explicitly or implicitly, without being subject to any restrictions or conditions. However, the question arises: does the arbitral tribunal enjoy such broad authority in applying trade customs in the absence of the parties' choice of the applicable legal rules?

B. The arbitrator's authority to apply Lex Mercatoria

The importance of applying trade customs before arbitral tribunals is particularly evident when the parties have not chosen these customs to govern their contract or have not selected any legal system to govern the dispute. As we explained in the first section, the significance of trade customs in regulating commercial legal relationships is crucial. Arbitral tribunals are obliged, when examining commercial disputes, to seek the most appropriate and relevant rules for the dispute. This includes applying international trade customs and practices due to their high flexibility and broad coverage of various transactions. The French Court of Cassation, in its ruling of October 22, 1991, held that in the absence of an agreement between the parties on the applicable law, the arbitral tribunal is authorized to apply trade customs and practices, as they are most closely connected to the subject matter of the dispute (Najoud 2021, p. 277).

National legislations and arbitral bodies have emphasized the importance of applying trade customs in the context of international commercial disputes, whether the parties have agreed to choose them or not. This is affirmed by the Jordanian legislator in Article 36(c), which states: "In all cases, the arbitral tribunal must, when deciding on the subject matter of the dispute, consider the terms of the contract in dispute and take into account the prevailing customs of the type of transaction, the established practices, and the dealings between the parties." (Jordanian Arbitration Law No. 31 of 2001).

After the Jordanian legislator stated in Article 36(b) that the arbitral tribunal applies the substantive rules of the law it deems most connected to the dispute in the absence of the parties' choice of legal system, the legislator further clarified in Article 36(c) that the arbitral tribunal must consider and take into account the prevailing trade customs and practices related to the transaction in dispute when applying that law. Here, we emphasize the necessity for the legislator to explicitly stipulate the direct application of these trade customs rather than merely considering them. Explicitly and directly stating the application of these customs will enhance the flexibility of solutions and ensure legal security for the parties.

Based on the fact that customary rules are substantive rules and part of the legal system to which arbitrators belong, some legal scholars argue that these arbitral bodies should directly apply trade customs without resorting to conflict-of-law methodologies, treating them as the arbitrators' law rather than merely contractual terms (Sadiq 1995, p. 569). This is because the arbitrator enjoys independence unparalleled in national systems, granting them broad options to resort to non-national rules, whether by agreement of the parties or without it (Tarawneh 2020, p. 27).

It appears that the arbitral tribunal enjoys extensive authority in applying international trade customs, as manifested in numerous arbitral decisions. International trade customs may be applied in cases where the application of a specific law to the dispute is impossible due to contractual deficiencies or contradictions, leading to it not being linked to the law of a specific state, such as when the parties remain silent on specifying a particular law or each party insists on applying its national law. This empowers arbitrators to apply trade customs as the basis for arbitration and judgment (Tarawneh, 2020, p. 36). Moreover, when the law applicable to the dispute conflicts with the requirements of international trade, arbitrators may resort to applying trade customs, especially when there is disagreement over the interpretation of a chosen law. An arbitral tribunal, for instance, excluded federal law from the dispute and emphasized the importance of selecting rules in international trade that yield expected results, align with the parties' intentions, and consider prevailing market customs. This presents an opportunity for the application of Lex Mercatoria for determining compensation (Najoud 2021, p. 279).

The following question arises from the foregoing: Does it mean that arbitrators are obliged to apply international trade customs even at the expense of applying national laws in case of conflict with national laws? To what extent do arbitrators have the freedom to apply international trade customs and exclude national laws? It can be said that despite the importance and role of commercial customs in resolving international trade disputes, the prevailing opinion in Arab jurisprudence is that arbitrators must consider a graduated approach to legal rules in terms of their binding force when applying these customs and practices. Therefore, they should take into account mandatory rules in the national laws chosen by the parties while also considering the supremacy of international custom over national custom. This is affirmed by the principle of the supremacy of international rules over national rules (Al-Masry 2006, p. 375). Consequently, the application of customs and trade practices remains circumscribed within the scope permitted by national laws and international agreements.

Conclusion and results:

In conclusion and based on the clarification of the concept of international trade customs, their sources, and their significant role in the field of international trade, particularly in arbitration disputes, it is evident that they play a crucial role in fulfilling the urgent need for an effective and flexible legal system that can adapt to the evolving dynamics of the commercial world. Their characteristics make them the ideal means to address disputes.

Whereas a series of findings and recommendations have been reached, which are outlined as follows:

1. Commercial customs encompass numerous legal rules and principles, earning them the title of International Commercial Law, and they play a fundamental role in resolving disputes arising from international commercial contracts.

2. Commercial customs derive their rules and provisions from various sources, all of which have played a significant role in facilitating international trade and guiding international arbitrators in resolving different disputes.

3. Opinions have varied regarding whether commercial customs should be endowed with binding force, with some considering them as an independent legal system that can be directly applied, while others argue that they can only be applied if explicitly included in the contract as an agreement.

4. Commercial customs and practices can be applied by arbitrators when the parties express their intention to apply them to the dispute, based on the principle of party autonomy, whether this intention is explicit or implicit. Arbitrators can also apply them in cases where the contract is silent on the governing law, or when the applicable law conflicts with the requirements of international trade.

5. We recommend that the Jordanian legislator explicitly and directly incorporate the application of commercial customs and practices in commercial disputes before arbitration tribunals, rather than merely considering the existence of such customs and practices. We propose amending paragraph (j) of Article 36 of the Jordanian Arbitration Law to read as follows:

"The arbitration tribunal must, when deciding on the subject matter of the dispute, consider the terms of the contract agreed upon and apply the international commercial customs and practices related to the subject matter of the contract in cases where the contract is not governed by any law."

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