International Journal of Law and Politics Studies
ISSN: 2709-0914
DOI: 10.32996/ijlps
Journal Homepage: www.al-kindipublisher.com/index.php/ijlps

IJLPS
AL-KINDI CENTER FOR RESEARCH AND DEVELOPMENT

| RESEARCH ARTICLE

Lex Mercatoria as Substantive *Applicable Law of* International Sale and Purchase Contracts

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| ABSTRACT
This study aims to analyze lex mercatoria as a substantive applicable law international sale and purchase contract. The research method used is a qualitative method. The research results show that international trade activities often lead to disputes between the parties. And the choice of dispute settlement can be made either in court or in arbitration. There are two types of law that apply and are used in international arbitration, namely arbitration procedure law and arbitration substantive law. The substantive law is in the form of a country's national law and/or international conventions related to contracts and lex mercatoria. Lex mercatoria is the law of traders derived from trade usages and general principles of law. CISG can be classified as one of the lex mercatoria because there are principles that generally govern sales and purchase contracts which are referred to as the general principles of international contract law so that the general law principles in this contract are applied as substantive law by arbitrator judges in deciding contract disputes, international sale and purchase in international arbitration**.**

| KEYWORDS

Lex Mercatoria, Sale and Purchase, International Law, International Contracts, International Arbitration

| ARTICLE INFORMATION

ACCEPTED: 10 April 2023 **PUBLISHED:** 18 April 2023 **DOI:** 10.32996/ijlps.2023.5.2.8

1. Introduction

International trade practices require harmonization and the principle of balance; therefore, laws are needed that regulate them. The law is used in international trade because it involves many countries, it involves many laws that are not uniform, so there are often many problems, including the legal power of negotiations that vary between laws in one country and another. Therefore, the applicable law is needed in the contract.

One problem, for example, is that there is a legal system that requires that contract negotiations are not binding at all before the contract is signed. The legal system in Indonesia (based on the Civil Code) adheres to this system. However, there is a system in certain countries that expressly states that negotiations are not binding based on a bond called a preliminary contract. If an agreement is made, it will cause problems that must be resolved in court. In general, in countries that adhere to the Common Law Legal System. Negotiations are already considered binding.[1]

The next problem is an acceptance that is not the same as the offer. The acceptance or acceptance of an offer by one party in international trade is not exactly the same as an offer that has been made by the other party. Against such incidents, legal arrangements in one country to another vary. Indonesian Civil Law considers that if there is a difference between the offer by one party and acceptance by the other party, then we agree that it is considered not formed, so the contract has not been considered

[1] Soedjono Dirdjosisworo, *Introduction Law Trade International*, (Bandung: Refika Aditama, 2006), thing. 33.

to have occurred (Article 1320 of the Civil Code: agreement, competence, a certain thing and a lawful cause). However, the law in the USA sees acceptance gradually, meaning how far deviations are made in the acceptance.[2]

International trade also differs in terms of the supply of an offer. In general, the USA considers that an offer can always be cancelled before there is an agreement. However, in countries that have legal provisions that state the offer or offer is a unilateral act, if a certain time is *reasonable (reasonable time*), then the offer can no longer be revoked unless canceled by both parties. There are various offers or offers, including a free offer, where the seller only includes a record of the price of goods that are not binding (*without engagement*).

Consideration in buying and selling is an action done or not done by one party in exchange for achievements made by the other party under a contract. Without a contract, there is no necessity for him to do or not to do an act. For example, the buyer makes consideration in the form of paying the price of the item. In countries with a common law system (Anglo Saxon), consideration is a condition of validity of a contract with some exceptions and diminishing enforceability. While Continental Europe, including the Netherlands and Indonesia, did not apply the doctrine of consideran.

Some countries impose a provision that acceptance has occurred, and therefore agreement has been reached. When the receiving party of the offer reasonably sends its acceptance (approval) to the party making the offer (offer). When compared to the New Netherlands BW (NBW), the practical aspect of the contract is firmly regulated and follows the principles of UNIDROIT. Article 217 NBW states: (1) A contract is formed by an offer and its acceptance, (2) Articles 219-225 apply unless the offer, another juridical act or usage produces a different result[3].

Differences in national laws between one country and another, as well as the customs adopted within a country in international trade, are interesting things to study. International customs in the field of trade have been recognized as binding legal rules. This custom is commonly called *Lex Mercatoria* (the law of merchants). This habit is born and develops from habits or practices carried out by traders themselves, which, if not implemented, there are feelings of guilt from traders. Therefore this custom of international trade is considered binding between them.

According to Horn and Schmitthoff, international trade habits have two characteristics, namely:[4]

a) This source of law is usually formulated by international institutions or trade associations; and
b) Such sources of law will apply if the parties state or include them in their contract.

Based on the above, the legal force of international customs is not automatically binding. The parties must include it in the clauses of the contract they agree upon. If the parties agree not to use certain international customs, it will be void and non-binding for the parties. Within UNIDROIT, trade customs and practices are recognized in contracting. This can be understood considering that international trade rules are the [5]*law among merchants* or *lex mercatoria* so that customs and practices that apply and are recognized in international trade activities are also recognized in contracting.

2. Discussion

1. *Lex Mercatoria* in International Sale and Purchase Contracts

Lex Mercatoria is a set of common law principles and customary rules that spontaneously refer to or elaborate on international trade without reference to a country's national legal system. Thus, lex mercatoria applies when the parties include it in their contract based on the principle of party autonomy, but *lex mercatoria* does not refer to any particular national law of the parties. [6]

The doctrine of *Lex Mercatoria* was developed by European jurists, such as Fragistas, Goldstain, Clift Schmitthoff, Goldman, Kahn, Fouchard, Horn, Ole Lando, and Eugen Langen. [7] In general, in some literature, the term *lex mercatoria* is given the definition of uniform *law* whose existence is accepted by the commercial community in various countries. However, the word "uniform" has been criticized as impossible to establish a uniform civil law in force in different countries. According to Alan D. Rose, it is more

[2] *Ibid*thing. 36
[3] Taryana Soenandar, *UNIDROIT Principles as a Source of Contract Law and Business Dispute Resolution*, (Jakarta: Sinar Grafika, 2004), p. 109.
[4] see deep Huala Adolf *Legal Basics Contract International*, (Bandung: Refika Aditama, 2008)thing. 72
[5] Principles of International Commercial Contract
[6] Huala Adolf *Op.Cit*., hAl. 68
[7] Klaus Peter Berger, The Lex Mercatoria Doctrin and The UNIDROIT Principles of International Commercial Contracts, Georgetown: Law and Policy in International Business, Vol. 28, 1997, p. 943

appropriate to use the term harmonization (harmonization) and this term is[8] widely adopted as the equivalent of the word lex mercatoria or the law of merchants.[9]

In some literature, there are many opinions about the definition of lex mercatoria, and most give the definition as *international commercial customary law*. For example, Jan Ramberg stated:

> "*Lex Mercatoria is defined as customary transnatinal law of international strict sensu, rules and institution conceived by nations (from which they were taken) to govern their international (commercial relation) which is a position with respect to positive law could be looked at in two ways that lex mercatoria perceived and applied as a body of legal rules within the international community of merchants, or at least-so as not to prejudice the controverted existence of a legal order formed by this international community-within homogenous milieu of agents of international trade*. "

Binding customary international law [10]practices are international customary practices that may have developed due to the recognition of the principle of party autonomy which has been explained by the existence of a basis or reference material if there is a dispute over international trade contracts, as expressed by Fox below:

1) Principle of Freedom of Contract/ Party Autonomy;
2) Pacta Sunt Servanda Principle;
3) the principle of good faith;
4) The principle of overmacht or impossibility of performance; and
5) The binding power of habitual practice[11]

Customs in the field of international trade, according to Horn and Schmitthoff, have two characteristics: the first is formulated by an international institution or trade association, and the second applies when the parties declare or include it in their contract.[12]

An advocate and exponent of lex mercatoria, Professor Goldman defines specifically the meaning of lex mercatoria as follows:[13]

"Lex mercatoria is a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law."

The origin of the formation of *lex mercatoria* can be traced by looking at the sources of international contract law. There are seven sources of international contract law, namely:[14]

1) The national law of a country is either directly or indirectly related to contracts;
2) Contract documents;
3) Customs in the field of international trade related to contracts;
4) Common law principles regarding contracts; e. Court rulings;
5) Doctrine; and
6) International agreements on contracts.

Lex mercatoria is one of the customary practices that have binding force because it has become written law through commercial judge decisions, arbitrations, or standard contractual clauses issued by business law organizations. Therefore, lex mercatoria is a customary practice that has been codified so that it can be classified into two categories, namely international trade customs and international agreements.

[8] Alan D. Rose A.O, The Chalanges for Uniform Law in The Twenty-First Century, Uniform Law Review, NS-Vol. 1, 1996-1, p 9-25.
[9] Norbert Horn, The United Nations Conventions on Independent Guarantees and the Lex Mercatoria, Rome: Centro di studi e ricerche di dirito comparator e straniero, 1997;
[10] *Ibid*, hAl. 33
[11] *Ibid*thing. 28
[12] Norbert Horn and C.M Schmitthoff, "The Transnational Law of International Commercial Transactions", Kluwer, Deventer, 1982, hAl.24
[13] Berthald Goldman, "The Applicable Law: General Principles of Law: The Lex Mercatoria, Julian D.M. Lew ed., 1986, pp.113-116, see also Abul F.M. Maniruzzaman, "The Lex Mercatoria And International Contracts: A Challenge For International Commercial Arbitration" Maniruzzaman Published, 2006, hAl.661
[14] Huala Adolf *Op.Cit.*, hAl. 69.

This opinion is corroborated by the opinions of scholars, one of which is Alexander Goldstain, who divides lex mercatoria into 2 kinds as[15] follows:

a. International legislation covering a country's national laws applicable to international commercial transactions and international treaties;
b. International Commercial Customs include commercial practices and standards used by traders issued by international trade associations.

The two sources of lex mercatoria law described above are further divided into four categories, namely common law principles, uniform law of international trade, custom and propriety, and arbitral awards.

There are two kinds of legal options known in Private International Law. First, the choice of law is unequivocal. Generally, this choice of law is expressly stated in an arbitration agreement. That is, in the arbitration agreement, it has been expressly stated what law will be used by the parties to resolve disputes that will occur in the future. The second is the tacit choice of law. This choice of law is generally not expressly stated in the agreement, but this choice of law will appear through the interpretation of the content of the contract or the will of the parties. For example, in a contract agreement between an Indonesian company and America, including several articles of Indonesian Civil Law, it indirectly appears that the parties want the contract to be subject to Indonesian law. So that if in the future there is a dispute between the parties, then the law that will be used to resolve the problem is Indonesian law.[16]

2. *Lex Mercatoria* as *Substantive Applicable Law* of International Sale and Purchase Contracts

The term *international business transaction* can be interpreted as follows:

> "*International business transaction is any type of deal between parties from at least two different countries. These transactions include sales, leases, licences, and investment; the parties to international business deals include individuals, small, large multinational corporations, and even countries.*" [17]

As explained in the previous chapter, to ensure the legal certainty of the parties conducting this international business transaction, the legal relationship needs to be poured into an international business contract. The application of *lex mercatoria* as a substantive law in international arbitration must, of course, begin from the point of formation of a business contract

To ensure the legal certainty of the parties conducting this international business transaction, the legal relationship needs to be poured into an international business contract. The application of *lex mercatoria* as a substantive law to international arbitration must, of course, begin from the point of forming an international business contract between the parties. The formation of an international business contract is, of course, not directly in the form of a contract that contains the rights and obligations of the parties, but there is a legal system of the parties that affects it.

To assist the parties in determining the choice of law to be used in arbitration, for example, several international conventions include this issue in their articles. One of them is the ICC, where in Article 15 (1) of the ICC it is stated that in arbitration proceedings, the ICC rules apply first, but in the event that there are some issues that have not been regulated in the ICC rules, the parties may determine for themselves the rules to be used.

Differences in legal systems adopted by countries in the world can cause disputes between parties which carry out cross-border buying and selling. There are 4 divisions of legal systems in the world, namely the Continental European legal system (*civil* law), the Anglo Saxon legal system (*common* law), the customary law system, and the legal system based on religion. The two dominant legal systems adopted by most countries in the world are[18] *civil* law and *common law* legal systems.

The doctrine of *Lex Mercatoria* is closely related also to contract law, especially commercial contracts, which is customary law in business society in the process of making and executing business contracts. Judging from the stages, all contracts go through 3

[15] Alexandar Goldstain, "Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980 Sales Convention)", Oceana Publication Inc., New York, 1996, see also Taryana Sunandar, Op.Cit., p. 23

[16] Yahya Harahap. Arbitration, reviewed from the Amendment Civil Procedure (Rv), BANI's Rules of Procedure, International Centre For The Settlement Of Investment Disputes (ICSID), UNCITRAL Arbitration Rules**,** Convention Of The Recognition And Enforcement Of Foreign Arbitral Award, Perma No.1 Of 1990, Second Edition. Jakarta : PT. Sinar Grafika, 2001.p. 102.

[17] Kenneth C. Randall and John E. Norris, "A New Paradigm For International Business Transactions", Washington University Law Review Volume 71, 1993, p. 599

[18] R. Abdoel Djamali, *Introduction Indonesian Law*. Edition Revision, (Jakarta: PT. Grafindo Persada, 2005), hLm. 67

(three) stages, namely the negotiation stage, the formation of contracts, and the performance *of contracts*. Before negotiating, both parties must meet the conditions to guarantee the validity (validity) of closing a contract. Provisions that limit the validity of contracts, such as issues of maturity, immorality, and public interest. It is considered a matter of national law of each State, so UNIDROIT does not specifically regulate this matter.

There are several international agreements included in the *lex mercatoria* relating to international trade contracts or by scholars referred to as the General Principles of International Contract Law as[19] follows:

a. The International Institution for the Unification of Private Law (UNIDROIT) on the Principles of International Commercial Law of UNIDROIT;
b. The United Nations Conventions on International Sale of Goods (CISG) was created by the United Nations Commission on International Trade Law (UNCITRAL), which contains international conventions on international sale and purchase from UNCITRAL
c. The United Nations Convention on the Use of Electronic Communication in International Contracts 2005 (ECC) is the United Nations Convention on the Use of Electronic Communication in International Contracts 2005.[20]

Because it is codified in international treaties, *lex mercatoria* becomes *hard law*. This is confirmed by the Legal Studies Research University of Minnesota Law School as follows:

> "*Private organizations may take the lead in developing self-regulatory lex mercatoria regimes. However, where these regimes become codified in international hard law*. "[21]

Private international organizations can play a role in balancing the nature of the lex mercatoria regime with the codification of hard law international law. For the entry into force of hard law in a country, the international treaty must first be ratified or ratified in the form of accession or a declaration of voluntary submission to the international treaty.[22]

So that a country can be subject to the provisions of the lex mercatoria, then the country must ratify the treaty in question first. The provisions of the lex mercatoria ratified by the country can be used as a reference for the choice of law in deciding international trade contract disputes, especially in international arbitration.

Arbitration has *developed as a method of resolving disputes rapidly as traders travel from place to place*. Lex mercatoria and arbitration have a very strong correlation, as described by John B. Tieder that there are four areas that are interrelated with each other covered by Lex Mercatoria, namely[23]: "*Lex mercatoria covered four interrelated areas (1) contracts, (2) bills of exchange, (3) shipping, and (4) arbitration*.[24]

In the last two decades, parties to international trade contracts have had a tendency to enter into contractual relationships with arbitration clauses; this is because arbitration is a quality, neutral and *non-corrupt* dispute resolution forum.[25]

The choice of arbitration forum is the authority of the parties in relation to the contract they make, so to determine which forum is authorized to adjudicate international business disputes, the answer depends on the will of the parties themselves, which comes from the theory of choice *of forum*. The choice of [26] forum is different from the choice of law in that these two clauses are not required to exist in a contract, but various literature suggests that these two clauses should be present in international contracts.[27]

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[19] Term .ini Taken writer from Journal of International Dispute Resolution: The Comparative Law Yearbook of International Business Special Issue2010, Kluwer Law International

[20] *See* John John B. Tieder, Jr. and Carter B. Reid, "International Contract Law As The Substantive Law Applicable to International Contracts,Kluwer Law International, New York, 2010, p.110-

[21] Gregory C. Shaffer and Mark A. Pollack, "Hard vs. Soft Law: Alternatives Complements and Antagnists in International Governance", Legal Studies Research Paper Series, University of Minnesota Law School, 2010, hAl. 767

[22] Huala Adolf *Op.Cit*., hAl. 78

[23] *Ibid*

[24] John B. Tieder, Jr. and Carter B. Reid, *Op.Cit*., hAl.105

[25] M. Yahya Ha, *Arbitrage*, Ed.2 cet. 2, (Jakarta, 2003), hAl.4

[26] Leonora Bakarbessy, "Settlement Dispute Business International Through Forum Arbitrage", Thesis, Faculty University Law Airlangga, Surabaya, 2002

[27] Huala Adolf *Op.Cit*., hAl. 166

The choice of law is different from the choice of forum; for example, if there are businessmen from Iran and Indonesia conducting international trade contracts, in their contracts, a dispute resolution clause in the form of choice of law of Indonesian *law* is included but not necessarily, the *choice of* forum is the Indonesian court, the parties are allowed to choose another forum, for example, Indonesian arbitration (BANI) or the court Indonesia or third-party international arbitration such as Singapore arbitration with the condition that the third party arbitration relates to the sale and purchase contract they make.

The determination of the forum that adjudicates international contract disputes is the agreement of the parties (the principle of party autonomy) so that this agreement gives and gives birth to the authority of the forum chosen to handle the parties' disputes. In the selection of arbitration forums, especially international arbitration, there are two types of [28]*law applicable* to international arbitration, as stated by Tieder as follows:[29]

"There are two distinct bodies of law applicable to every international arbitration. The first is the law applicable to the arbitral proceedings itself. This is usually determined by the parties' choice of the arbitral, administrative body, such as the International Chamber of Commerce (ICC), and the corresponding arbitration rules."

> "*The second body of law is the substantive law applicable to the matter being arbitrated. This is usually decided by the parties in the contract that is the subject of the arbitration or in the separate arbitration agreement in a post-dispute agreement to arbitrate. In the absence of an agreement, the substantive law applicable to the matter is decided by arbitral tribunal applying the choice of law provision of the seat of arbitration*."

In Tieder's opinion above, in international arbitration, there are two types of law applied, namely the first is the law that applies to international arbitration proceedings, namely the procedure of the arbitration process itself. This law is usually determined based on the choice of the parties from an arbitral administrative institution such as the International Chamber of Commerce (hereinafter referred to as the ICC) and its related arbitration rules.

Furthermore, the substantive substance that applies to the matter under examination. This substantive law is usually chosen by the parties to the contract that is the subject matter of the arbitration or entered into in a separate arbitration agreement made after the dispute arises. If there is no such agreement, the substantive law applicable to the case may be determined by the arbitral body that will apply the arbitral body's choice *of law*.

International conventions, which are lex mercatoria or when related to international contracts, *lex mercatoria* is one of them known as the general *principles of international contract law*. General principles of law are used in arbitration, namely:[30]

1) When these general principles are selected as the substantive law by the contracting parties;
2) When the contract has no choice of law provision; and
3) When they are applied even though the parties have selected a national law.

International trade contracts are the most common form of international trade contracts in trade transactions, considered the oldest form of contract and the basis for other contracts. As mentioned in Article 1 (1) of the CISG, the scope of the enactment of the CISG as a legal source of sale and purchase contracts is as follows: [31]

"This convention applies to contracts of sale of goods between parties whose places of business are in different states:

a. When the states are contracting parties
b. When the rules of private international law lead to the application of the law of contracting states."

From the sound of Article 1 paragraph 1 above, it can be seen that the CISG applies if the parties to the contract, one or both, are nationals of a state party to the CISG Convention and if the application of private international law of that person's state refers to the entry into force of the law of a State party to the Convention. Then, the last point of private international law designates the law of a participating state if the contracting parties do not determine the *choice of law* in the contract.

[28] Ibid, p. 164.
[29] John B.Tieder Jr., et.al, Op.Cit, p. 103
[30] John B.Tieder Jr., et.al, *Op.Cit*, p. 124
[31] Huala Adolf *Op.cit*. thing. 107

3. Conclusion

International trade activities often lead to disputes made by the parties. And the choice of dispute resolution can be made either to a court or to arbitration. Due to different domiciles or nationalities, the laws used are also different. So if it is not clearly stated in the contract they make, there will be a new problem, namely the judge must determine which law they will use in resolving the dispute because the different laws applied can be different decisions from the judge or arbitration. In its development, the law of the merchant is one of the legal options used by judges for the settlement of international trade disputes. In general, lex mercatoria is defined as the general customs and propriety of the business community that is applied to the practice of commercial law in various countries and used in the event of legal gaps. This can provide a solution because there is no national law that governs, so judges and arbitrators can choose lex mercatoria equipped with the principle of equity as material for legal discovery (rechtsvinding) by judges or arbitrators.

There are two types of law applicable and used in international arbitration, namely, the procedural law of arbitration proceedings and the substantive law of arbitration. The substantive law is in the form of a country's national law and/or international conventions relating to contracts and lex mercatoria. *Lex mercatoria* is a law of merchants derived from *trade usages* and *general principles of law*. CISG can be classified as one of the lex mercatoria because there are principles that govern the general principles of international contract law so that *the general principles of* international contract law are applied to substantive law by arbitrator judges in deciding international sale and purchase contract disputes in international arbitration.

Funding: This research received no external funding.
Conflicts of Interest: The authors declare no conflict of interest.
Publisher's Note: All claims expressed in this article are solely those of the authors and do not necessarily represent those of their affiliated organizations, or those of the publisher, the editors and the reviewers.

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