

Lex Mercatoria in International Arbitration

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I. Applicable Law in Arbitration

When parties agree that any dispute that may arise between them shall be referred to arbitration, in addition to the subject matter of the dispute, the determination of the applicable law is also of major importance.

Although the parties may not have the liberty to choose the applicable law in national courts, this freedom has been granted to the parties in arbitration.

The parties may choose that the disputes between the parties shall be resolved according to applicable laws of a national country or according to generally accepted principles, also known as *lex mercatoria*. It should be stated that the parties may also determine that applicable law to the dispute shall be the law of a national country and *lex mercatoria*.¹

Within this context, the definition of *lex mercatoria* and its close relation with arbitration, commercial rules and generally accepted principles should be evaluated.

II. Lex Mercatoria

Commerce in Europe experienced a renaissance in the 11th and 12th centuries.² This evolution was caused first of all by the fact that the eastern markets had become reachable and second by the political and economic evolutions in Europe.³

This process caused a class, i.e. merchants, to create its own law. The roots of this law are based on Rhodes Maritime Law and *ius gentium* founded on Roman and Greek Laws.⁴ It should be stated that this law, which is based

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1 Lando, Ole, "The Law Applicable to the Merits of the Dispute," in Lew, Julian DM: Contemporary Problems in International Arbitration, London, 1987, 104; Davidson Matthew, "The Lex Mercatoria in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database," accessed on 08 May 2002, at <http://www.cisg.pace.law.edu>.

2 Goldman, Berthold, "Lex Mercatoria," Forum Internationale, Deventer, 1983, 3.

3 Berman, Harold and Kaufman, Colin, "The Law of International Commercial Transactions (*Lex Mercatoria*)", 19 Harvard International Law Journal 224 (1978).

4 Oğuz, Arzu, "Hukuk Tarihi ve Karşılaştırmalı Hukuk Açısından Uluslararası Ticaret Hukuku (*Lex Mercatoria*) --

on customs and traditions, showed its first development in maritime law. Afterwards, taking into account the development of commerce, *lex mercatoria* evolved to encompass maritime law.⁵

This process, which had begun by the renaissance of the Roman law, had spread all over Europe and survived until recently.⁶ It is a generally accepted fact that the adoption of the Roman law started in Italy and ended up in Scandinavia after approximately 400 years.⁷

Over almost all of Europe (except in the UK) a new law called *ius commune*, which was not superior or superseding but coexisting with regional laws, aimed to fill the gaps in the regional laws and which was based on Roman law, had started to flourish.⁸ In other words, the presence of regional laws in Europe had not prevented the flourishing of a common law.⁹ The term *lex mercatoria* is a modern expression of the *ius commune*.¹⁰ In other words, *lex mercatoria*, *ius commune* and *law merchant* have the same meaning.

Even though the merchant law was born in an environment of dualism, i.e. feudal and Roman law, its failure to answer the needs of merchants should be assessed. Furthermore the definition of the new *lex mercatoria* and its basis should also be determined.

III. Medieval Merchant Law

The term medieval refers to the period after the collapse of the Roman Empire in the fifth century. The most important difference of this period from today was the lack of national countries. Since there were no national countries there were no national laws. Therefore one can state that the presence of different law systems resulted in different laws being applied to different persons. Within this context it should be stated that the application of law was not regional but personal.¹¹

Although in medieval law the concept of change in title was present, change in title with consent was only interpreted as a gift or donation. The transfer of title in commercial terms as it is interpreted today was accepted by the end of the 10th century.¹² Within this context, it should be stated that up until that time commerce was present, but was considered to be only a trifling exchange in terms of donation. Since transportation was dangerous

Unidroit İlkelerinin Lex Mercatoria Niteliği", 50 AÜHFD 14 (2001).

5 Trakman, Leon, "The Evolution of the Law Merchant: Our Commercial Heritage", 12 Journal of Maritime Law and Commerce 4, 1980.

6 This common law (*ius commune*) had been left by the entering into force of the German Civil Code in 1900. Koopman, Thijmen, "Towards a New '*Ius Commune*,'" in Witte, Bruno and Forder, Caroline, The Common Law of Europe and the Future of Legal Education, Kluwer Law, 1992, 44.

7 *Id.* at 43.

8 Oğuz, Arzu, "Sözleşmeler Hukukunda Hukukun Birleştirilmesi," 49 AÜHFD 44 (2000); Koopmans, *supra* note 6, at 43.

9 Oğuz, Arzu, Karşılaştırmalı Hukuk, Ankara, 2003, p. 57.

10 Fortier, Yves, "The New, New *Lex Mercatoria*, or Back to the Future", 17 Arbitration International 125 (2001).

11 For example a priest was living in accordance with the canon law system, however canon law would not be applied to a farmer. Volckart, Oliver and Mangels, Antje, "Are the Roots of the Modern *Lex Mercatoria* Really Medieval?", 65 Southern Economic Journal 435 (1999).

12 *Id.* at 436.

and expensive, the goods in commerce were categorized as luxury goods. The change in the personal status of merchants after the 10th century, i.e. after the grant of free person status to merchants, led to an increase in commercial transactions.

In the 11th century, the medieval period was characterized as dangerous and unstable with regard to legal transactions. For this reason, merchants experienced a transformation and formed guilds in order to protect trade from looters. It should be understood that, in the medieval period, merchants were engaging in commerce by changing places with their goods. Therefore, by organizing themselves into guilds, merchants were both protecting themselves from the looters while increasing the volume of their commerce. Since commerce was practically not regulated in legal systems in the 10th and 11th centuries, the guilds started to create their own system of law. Since the legal systems did not regulate commerce in the medieval period, other than the formation of *lex mercatoria* today, the medieval law had only been completed and had not been replaced by “law merchant.”¹³ However the law merchant subject to creation today is in process of replacing national legal systems.

According to a legal system created by the guilds, disputes were generally solved within the guilds. The execution of the decisions was assured by the reputation of the merchants. Nowadays, the loss of reputation could be a reason for a decrease in commercial transactions or even the total loss of it, however in the medieval period the loss of reputation generally resulted in expulsion from the guild.¹⁴ The most important sanction within the guild was expulsion; however another sanction available within the guilds was that if a foreign merchant was an enemy to a merchant member of a guild then all guild members would be an enemy to this merchant.

All disputes between a merchant and a non-merchant were subject to feudal law and courts. However, since an oath was a primary source of proof before the feudal courts, merchants who were constantly traveling were unable to find reliable persons to give an oath. In this case, merchants especially were subject to duel or an institution called an “ordeal” in which the accused were thrown into hot or boiling water; if they survived, they were not guilty.¹⁵

Only after the evolution of the cities into prototypes of national countries in the 11th and 12th centuries, and the possibility of the successful execution of decisions had increased, did the disputes between the guilds and disputes between the members of a guild evolve.

The main reason for feudal lawmakers to protect merchants and to enact new laws granting special rights and privileges to the merchants was the-

¹³ *Id.* at 439.

¹⁴ *Id.* at 440.

¹⁵ *Id.* at 442.

ir addiction to luxury goods.¹⁶ Finally with those special rules and laws, merchants had become a privileged class in society and all the rules that applied to the members of that class had started to be called the *ius mercatorum*.¹⁷ It should be remembered that the term *lex mercatoria* had first been stated in the Fleta Laws in 1290, which stipulated that merchants were not subject to standard laws and rules but were considered to have a different status.¹⁸

The formation of regional (city) laws had minimized the execution problems stated above that had affected the merchant law. It should be stated that in most of the cities, new courts were established in order to solve disputes between foreign and local people. The only difference with those courts was that they were speedily rendering their verdicts and there were no appeals for those verdicts. It is clear that those courts constituted an answer to the merchants' need for fast resolution of disputes. Within this context, it should be stated that those courts were answering the same needs as the merchants today who seek recourse to arbitration to settle disputes.

It is clear that merchant law which was constituted during medieval ages had affected regional (the cities') law.¹⁹ The differences between cities' laws on similar issues was probably due to differences between the guilds' rules. One can ask what is the relation between this law and new *lex mercatoria*?

IV. The New *Lex Mercatoria*

It should be stated that merchant law, *lex mercatoria*, had flourished during the medieval age and started to be nationalized afterwards. However it did not die and has started to be rejuvenated today.²⁰

Modern *lex mercatoria* is defined as an international law system applied by international merchants based on commercial rules and principles.²¹ Some of the writers state that the term *lex mercatoria* is not new; it is based on the *ius gentium* present in Roman law and even on ancient Egypt law.²²

16 *Id.* at 432.

17 *Id.* at 443.

18 *Id.* at 443, n. 44. It should be stated that in UK although the law merchant had evaluated in parallel with Europe, it showed major differences thereafter. It is an undisputable fact that in 16th and 17th centuries courts dealt with a considerable number of commercial disputes. However in order to define the commercial rules and principles for merchants, new legislation was needed. Taking into account this need, Lord Mansfield had ruled that law merchant was not commercial rules and principles to be proved by the merchants but it is an issue which should be ruled by the courts and which should be applied to all persons. Trakman, Leon, "The Law Merchant: The Evolution of Commercial Law", 28, 1983; Trakman, *supra* note 5 at 156; Berman and Kaufman, *supra* note 3 at 226.

19 The main characteristics of medieval *lex mercatoria* were that it was the transnational law, its principia source was mercantile custom, function of judgment was governed not by professional judges but by the merchants themselves, its procedure was speedy and informal. Milenkovic, Tamara, "Origin, Development and Main Features of the New *Lex Mercatoria*", Economics and Organization, Vol. 1, No 5, 1997, 89.

20 Berman and Kaufman, *supra* note 3, at 273; Trakman, *supra* note 5, at 153.

21 Commercial rules and principles are based on 12th century. These rules and principles are based on mutual good will and trust. Ululsoy, Erol, *Ticari Örf ve Adet Hukuku*, Istanbul, 2001, 68-69; Kilian, Monica, "CISG and the Problem With Common Law Jurisdictions", 10 *Journal of Transnational Law & Policy* 219; Baron, Gesa, "Do the UNIDROIT Principles of International Commercial Contracts form a new *Lex Mercatoria*?" at <http://www.cisg.pace.law.edu>, 1998, 2; Lopez-Rodriguez, Ana Mercedes, "*Lex Mercatoria*", 2002, 46-56, available at <http://www.rettid.dk>; Volckart and Mangels, *supra* note 11, at 430; Goldman, Berthold, "The Applicable Law: General Principles of Law – the *Lex Mercatoria*," in Lew, Julian DM: *Contemporary Problems in International Arbitration*, London, 1987, 116.

22 Ferrari, Franco, "Uniform Interpretation of the 1980 Uniform Sales Law", 1994 *Georgia Journal of International and Comparative Law* 183 (1994), available at <http://www.cisg.pace.law.edu>; Lopez-Rodriguez, *supra* note 21, at 46.

This legal system called *lex mercatoria* is not enforced by any national law and is not contained in an international agreement.²³

Lex mercatoria, which was applied in the medieval age, had disappeared or melted into different legal systems by the 19th century when national laws and rules emerged.²⁴ Finally national laws had started to differ more and more because distance between the legal systems and commercial life had been established.

However *lex mercatoria* did not disappear completely. During this time, merchants founded international organizations, independent from states, (like the International Chamber of Commerce, (ICC)) in order to regulate commerce and inured rules with these organizations to bind the states as well as the merchants.²⁵ It is not surprising that *lex mercatoria* is active today since merchants, especially international merchants, believe that national rules are not appropriate for commerce, that conflict of law rules are complicated and finally that dispute resolution procedures take too much time.²⁶

For these reasons, the will to constitute rules which are flexible, fast and devoted to results is spreading.²⁷ This will is considered by some lawyers to be the driving force behind the formation of a new *lex mercatoria*.

Within this context, the assertions of two schools which are for and against *lex mercatoria* should be stated. Those who are against *lex mercatoria* assert that those rules are not “laws” and therefore they are not binding. Furthermore they state that since *lex mercatoria* is based on general terms and conditions as well as actual practice, it would be difficult for those rules to become law in the future.²⁸ Another assertion is that *lex mercatoria* is incomplete and is difficult to understand.²⁹ However, the questions remain on what grounds these rules are based and where these rules can be found?

On the other hand, some assert that *lex mercatoria* is valid law and had obtained its binding character from the fact that this law had been accepted by the societies which form the state and regulate international commerce.³⁰

Therefore it could be stated that *lex mercatoria* lacks the classical characteristics of laws while at the same time it suffers the characteristics of national laws.³¹

23 It had been stated that *lex mercatoria* is a law of an economic organisation which lacks any center and it represents the social function of a law. See Zumbansen, Peer, “Piercing the Legal Veil: Commercial Arbitration and Transnational Law”, 8 European Law Journal 416 (2002).

24 Baron, *supra* note 21, at 3.

25 *Id.*

26 Davidson, *supra* note 1, at 4.

27 It had also been stated that international commerce at present is due to *lex mercatoria* which is constantly evolving (Schmidt-Trenz, Hans-Jörg and Schmidtchen, Dieter, “Private International Trade in the Shadow of the Territoriality of Law: Why Does It Work?”, International Trade and the Territoriality of Law, Universität des Saarlandes, 2001, 336.

28 Lopez-Rodrigues, *supra* note 21, at 49, Baron, *supra* note 24, at 5.

29 Kilian, *supra* note 21, at 221.

30 Lando, O, “The *Lex Mercatoria* and International Commercial Arbitration”, 34 *ICLQ* 752 (1985).

31 Baron, *supra* note 24, at 6.

V. Sources of the New *Lex Mercatoria*

The new *lex mercatoria* is defined as a legal system³² comprising commercial rules and principles, model laws, general terms and conditions, general principles³³ and international arbitration.³⁴ However it should be stated that different definitions exist and those definitions do not represent an unanimous view. Since there is no unanimity in the definition of the *lex mercatoria*, opinions regarding its sources also lack unanimity. However a generally accepted source list shall be given below.

Within this context it should be stated that some lawyers think that *lex mercatoria* should be accepted widely as customary law – a synonym for international law,³⁵ however others think that it should only comprise model laws and other recommendations that international organizations prepare.³⁶

The main source of the *lex mercatoria* is commercial rules and principles. It is generally accepted that commercial rules and principles are rules accepted by merchants as binding without any need of a specific approval mechanism.³⁷ These rules and principles are generally codified by professional associations.³⁸

The second main source of the *lex mercatoria* is model laws and international contracts. An example of model laws is the *Uniform Customs and Practice for Documentary Credits-UCP*, prepared by the International Chamber of Commerce, and an example of international contracts is the *Uniform Law on the Sale of Goods-CISG*.

General principles of law can also be a source of *lex mercatoria*. Examples like *pacta sunt servanda*, *rebus sic stantibus* and goodwill are principles which have survived from the medieval age until today.³⁹ Determination of these principles necessitates the examination of different national laws on a comparative basis – very hard work.⁴⁰ However studies like the *Principles for International Commercial Contracts* conducted by UNIDROIT (the *International Institute for the Unification of Private Law*) facilitate this determination. It should be pointed out that these principles are a result of studies conducted to determine terms and principles common in

32 Volckart and Mangels, *supra* note 24, at 430.

33 General law principles had been defined as source of *lex mercatoria* and different work groups unified for the determination of these principles prove that *lex mercatoria* can be identified. Lopez-Rodriguez, *supra* note 24, at 52).

34 It is a well known fact that arbitration has great importance in the renaissance of the new *lex mercatoria*. Due to the fact that the arbitrator is simply not a guardian of the national law system but a person who is trying to reach justice by preserving the parties' benefit and interest. Moreover it should be stated that international law is constituted on three pillars namely the parties' interest, *pacta sunt servanda* and arbitration. Goldstajn, Aleksander, "The New Law Merchant", *Journal of Business Law*, 1961, 12; Goldstajn, Aleksander, "The New Law Merchant Reconsidered", in Schmitthoff, M., Frankfurt, 1973, 174; Schmitthoff, M. Clive, "International Trade Law and Private International Law", *Festschrift für Hans Dölle Bd. II, Vom Deutschen zum Europäischen Recht*, Iusg. E. v. Caemmerer, A., Nikisch, K. And Zweigert, Tübingen, 1963, 270.

35 While defenders of this opinion tend to include laws, international practices, commercial principles and international organization regulations into the term *lex mercatoria*.

36 Baron, *supra* note 24, at 4.

37 Volckart and Mangels, *supra* note 11, at 430.

38 As an example, INCOTERMS provisions and force majeure provisions of the ICC can be given.

39 Lando, *supra* note 30, at 750, Volckart and Mangels, *supra* note 11, at 431.

40 Lando, *supra* note 30, at 750.

different legal systems.⁴¹

International commercial arbitration constitutes a basis for the *lex mercatoria* since the commercial principles, general terms and conditions of commerce are backed up by the general principles of law and this system is the basis of international arbitration.⁴²

VI. The Relation Between the New *Lex Mercatoria* and Arbitration

First of all it should be stated that *lex mercatoria* has only limited applicability in national legal systems due to the fact that national laws and procedures have priority. Unlike national legal systems, *lex mercatoria* has more applicability in international commercial arbitration. Therefore it is a commonly accepted fact that *lex mercatoria* and international arbitration have a direct connection with each other. Most of the contracts and rules concerning international arbitration prepared after the 1950s stipulate that the arbitrators should take into account international commercial rules and principles even if the arbitration clause does not refer to *lex mercatoria*.⁴³ This determination is in parallel with the character of international commerce since the principle aim is to apply the rules of the international commerce during the arbitration.

Nowadays most commercial contracts (approx. 90%) include an arbitration clause.⁴⁴ Although some of these clauses stipulate that the law to be applied to the arbitration is a particular national law, some of them refer to *lex mercatoria* and/or equity.

VI.A. Explicit References to *Lex Mercatoria*

First of all, parties may refer to *lex mercatoria* explicitly in the arbitration clause as the law to be applied to the arbitration. It should be noted that when the parties stipulate *lex mercatoria* as the law to be applied to the arbitration, the arbitrators may be obliged in some cases to prove a real and creative effort to determine the principles of law and procedures to be applied.⁴⁵ Some assert that although the process of arbitration should grant some flexibility to the arbitrators, *lex mercatoria* is too vague and indefinite, i.e. the power granted to the arbitrators is inappropriate and create difficulties to the arbitrators as well.⁴⁶

Apart from the determination problem of the *lex mercatoria* it should be stated that parties have the right in most national legal systems to choose the law to be applied in case of a dispute between the parties. This rule also applies to arbitration. Within this context Article VII of the European

41 Erdem, Ercüment, "Lex Mercatoria ve ICC Tahkimi", Milletlerarası Tahkim Semineri, Ankara, 6 April 2004, 24.

42 Volckart and Mangels, *supra* note 11, at 432.

43 See Article VII of the European Convention on International Commercial Arbitration, Article 17 of the Rules of Arbitration of the International Chamber of Commerce.

44 Volckart and Mangels, *supra* note 11, at 432.

45 It had been stated that the arbitrators in some cases should use their creativity due to the fact that *lex mercatoria* provides limited source. Lando, *supra* note 30, at 752.

46 Kilian, *supra* note 21, at 222.

Convention on International Commercial Arbitration may be given as an example. According to this Article, “*The parties shall be free to determine by agreement, the law to be applied by the arbitrators to the substance of the dispute.*”

Determination of *lex mercatoria* as the law to be applied to the arbitration may either be done by an explicit referral or by a reference to general law principles, international commercial rules and principles and general terms and conditions of commerce.⁴⁷

VI.B. Implied Reference to *Lex Mercatoria*

Implied reference to *lex mercatoria* as the law to be applied to the arbitration may be determined by the evaluation of the contract concluded by the parties. Based on the evaluation of the contract provisions, one can determine the law to be applied to the arbitration as either a national law or *lex mercatoria*.

Implied reference to *lex mercatoria* is considered to be present most usually when the parties grant the arbitrators the right to act as *amiable compositeur*. It is an undisputable fact that arbitrators acting as *amiable compositeur* should take into account and solve the dispute according to *bona fide* principles and general rules and principles, or in other words, *lex mercatoria*.⁴⁸

VI.C. Lack of Selection of Applicable Law

Although determination of the applicable law for disputes is mostly welcomed by the arbitrators and accepted as a tool to construct the mutual trust and stability between the parties, for different reasons some international commercial contracts do not contain any choice of applicable law.

Failing any determination by the parties as to the applicable law, the arbitrators shall determine and apply the appropriate law for the arbitration. In this case, *lex mercatoria* may be applied by the arbitrators if deemed appropriate.

Determination of the *lex mercatoria* by the arbitrators is mainly due to the fact that *lex mercatoria* is more appropriate to the needs of international commerce, the expectations of the parties and the legal nature of the arbitration. Furthermore it must be stated that most international contracts and documents regulating international arbitration refer to the international commercial rules and principles, as well as trade usages, and state that these rules and usages must be taken into account by the arbitrators whether there is an explicit reference to a national law or not.

Within this context, Article 17 of the Rules of Arbitration of the

⁴⁷ Şanlı, Cemal, “Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk”, Ankara, 1986, 322.

⁴⁸ *Id.* at 325.

International Chamber of Commerce may be given as an example. According to this article, “*in all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.*”

VII. The Turkish Law System and the Applicability of *Lex Mercatoria*

It should be stated that there is no provision within the Turkish Procedural Law concerning the law to be applied by arbitrators. However, taking into account the application of *lex mercatoria* more often within arbitral decisions, the Turkish legal system has also recognized that arbitrators are not bound by the law to be applied to the arbitration, i.e. they can rule based on generally applied commercial rules and principles.⁴⁹ This reasoning is based on the fact that according to Article 533 of the Turkish Procedural Law, arbitral decisions cannot be overruled due to the fact that they are against the substantive law.^{50 51}

According to Article 12/C of the International Arbitration Law (Law 4686), the arbitral tribunal or the sole arbitrator shall render a decision according to the contract concluded between the parties and in accordance with the applicable law decided by the parties. Therefore the parties’ mutual will and understanding shall prevail.

According to the same article, generally applied commercial rules and principles related to the applicable law shall also be taken into account during the interpretation of the contract provisions. According to Turkish law, commercial rules and principles are construed as principles that have been applied for a long time and accepted as binding by merchants.⁵² Customs are to be construed as habits and not to be accepted as binding commercial rules and principles; therefore they may only be used to interpret the parties’ understandings.⁵³

It should be stated that due to the provision in Law No 4686 stating that “*commercial rules and principles related to the applicable law shall be taken into account during the interpretation of the contract provisions,*” commercial rules and principles that are only present in the applicable law may be accepted.⁵⁴ However it is clear that international commercial rules and principles are more recognized than national principles. Although the provisions of Law 4686 are generally in line with the UNCITRAL model law or similar regulations, this provision, which is against the UNCITRAL principles, may attract criticism. It is noteworthy that according to Article 28/4 of the UNCITRAL model law, an arbitral tribunal shall render its decision in accordance with the contract provisions and commercial

49 Özdemir, Didem, “Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk Olarak Lex Mercatoria”, Gazi Üniversitesi Hukuk Fakültesi Dergisi, Jun-Dec 2003, Vol. VII, Issue 1-2, 130.

50 Alangoya, Yavuz, Medeni Usul Hukuku Esasları, İstanbul, 2001, 585.

51 Please see decision E. 4, K. 1, dated 28 January 1994.

52 Arkan, Sabih, Ticari İşletme Hukuku, Ankara, 2004, 86; Ulusoy, *supra* note 21, at 75, 87.

53 Arkan, *supra* note 52, at 88.

54 Akinci, Ziya, Milletlerarası Tahkim, Ankara, 2003, 181.

rules and principles applicable to the commercial transaction. Therefore commercial rules and principles applicable to the commercial transaction are not considered to be national commercial rules related to a particular country.

It is a clear fact that the arbitral tribunal or the sole arbitrator shall designate the applicable law to the dispute, if the applicable law has not been determined by the parties. According to Article 12/C of Law 4686, the arbitral tribunal or the sole arbitrator shall designate a national law which has the closest relation to the dispute in case the applicable law has not been determined by the parties.

According to Law 4686, arbitrators may decide an arbitration case in accordance with *bona fide* principles and/or as a mediator or *amiable compositeur* only if the parties explicitly authorize them to do so. Arbitrators shall resolve the dispute in accordance with their own conscience if the dispute shall have been decided to be resolved according to *bona fide* principles.⁵⁵

Since the arbitral decision may be annulled or the execution may be denied due to a wrong determination of the applicable law, the determination of the applicable law is crucial at this stage. The arbitral decision may only be annulled if it is determined that the arbitrators had violated their authorization. It should be stated that an incorrect determination of the applicable law had been stated as a reason for annulment of an arbitration award both in Law 4686 and the UNCITRAL model law.⁵⁶

In conclusion, within an international arbitration conducted according to Turkish law (Law 4686), provided that the consent of the parties had been given, arbitrators may resolve the dispute in accordance with *lex mercatoria* comprising commercial rules and principles. Furthermore it should be stated that the Court of Appeals has also accepted that the primary consideration in arbitration is the best interests of the parties.⁵⁷ (However) As stated above, an arbitral award may be subject to annulment if the arbitrators were not authorized to act as they did by the parties.

⁵⁵ *Id.* at 163.

⁵⁶ *Id.* at 167.

⁵⁷ Please see decision E. 4, K.1. dated 28 January 1994.