

**THE FRAMING OF INTERNATIONAL CONTRACTS IN THE LIGHT OF
LEX MERCATORIA AND THE SEARCH FOR STABILITY IN CROSS-
BORDER RELATIONSHIPS**

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ABSTRACT: On the present academic paper, the author provides an overview concerning the internationality. In addition to the classical elements, the contemporaneity fosters a new proposal for the classification of international contracts. The proper and independent ruling by the *lex mercatoria* assesses a concrete international character. As a result, the judge must take into consideration the principles and the interpretation construed by the *lex mercatoria*, whenever analyzing an international contract. Such may vary, not being always in harmony with the general guidance prescribed by the national laws. In this regard, the overruling of what may be deemed as unacceptable will depend on local public policy/order.

Keywords: International contracts. *Lex mercatoria*. Legal nature. Internationality assessment.

**O ENQUADRAMENTO DOS CONTRATOS INTERNACIONAIS EM FACE
DA LEX MERCATORIA E A BUSCA DE ESTABILIDADE NAS RELAÇÕES
TRANSFRONTEIRIÇAS**

RESUMO: Este artigo visa a apresentar, sinteticamente, os contornos da internacionalidade, focando-se, especificamente, no esforço estabilizador em que consistem os contratos internacionais. Mais do que os elementos clássicos de conexão, a contemporaneidade estimula uma nova proposta de enquadramento dos contratos internacionais, levando-se em conta o tratamento que a *lex mercatoria* eventualmente dispensar a dado tipo contratual. Dessa internacionalidade empiricamente verificada decorreria a obrigação de o intérprete considerar hermenêutica própria àquele contrato, a partir de princípios cunhados na *lex mercatoria*, e que, por vezes, não são inteiramente identificáveis em ordenamentos nacionais, dependendo a efetividade do negócio jurídico das balizas de controle fixadas pela ordem pública local. Palavras-chave: Contratos internacionais. *Lex mercatoria*. Tipologia. Enquadramento da internacionalidade

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1 INTRODUCTION

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The intensification of the internalisation process, as seen in recent decades, marked by increased trade and the upsurge of investment flows, resulted in the deepening interdependence amongst different peoples.

This process, commonly known as *globalization*, has meant the diffusion of foreign elements coming through interpersonal relations. More often, we may observe atypical relations – private life situations which have some form of foreign characteristic; thus breaking through the fiction of typicality or normality associated to the exclusive link with any given State. The plurality is thus affirmed as a corollary of contemporary internationalization, notably the multiplicity of legal obligations, linking one single person (natural or legal) to the different legal systems.²

Contracts are essentially the regime which private citizens resort to so as to stabilise the private relationship, regulating acts and omissions, rights and obligations.³ Internationalization, whilst tainting every aspect of human life, also affects contracts.⁴ Frequently, one adopts a model which incorporates doctrines from more than one system, so the interest of each party may be satisfied.⁵

However, prior to moving onto the framework of international contracts, one must demarcate the area in which this study fits: for Pommier (1993, p. 25), international contracts are a branch of Conventional Private International Law: “The ensemble of rules originating from international conventional instruments applicable to private persons involved in contractual international relations.”⁶

² MARQUES, Cláudia Lima, *Ensaio para uma Introdução ao Direito Internacional Privado*. In: DIREITO, Carlos Alberto Menezes, TRINDADE, Antonio Augusto Cançado, PEREIRA, Antonio Celso Alves (Org.) Novas Perspectivas do Direito Internacional Contemporâneo: Estudos em Homenagem ao Professor Celso D. de Albuquerque Mello. p. 331.

³ Caio Mário da Silva Pereira places contracts in the civilization context of overcoming differences: “In parallel with the economic function, contracts play a role of civilization and education. It brings men together and brings differences down. Whilst individuals admitted the possibility obtaining the necessary by means of violence, one could not improve the ethical sense, which only came to bear a greater dimension when the excellence of contracts were perceived and as behavioural norms to achieve a desired goal were observed. PEREIRA, Caio Mário da Silva. *Instituições de Direito Civil - Contratos, Vol III*. p. 13. This is a fundamental reasoning as in Hobbes’ social theory, as well as in other authors, not by chance known as *contractualists*; the difference being that in contractualists political theories, contracts are the model to represent the very gregarious human experience of opting for society instead of chaos.

⁴ “Brazilian and foreign scholars have indeed made an effort to conceptualize international contracts in view of their undeniable importance to international trade, considering that the feature which differentiates them from domestic law contracts is the foreign element [...] which may connect them to more than one legal order.” NETO, José Cretella. *Contratos Internacionais - Cláusulas Típicas*. p. 8.

⁵ “International contracts stand in comparison with domestic law contracts as being connected to more than one law.” BASSO, Maristela. *Comércio Internacional. A boa-fé na execução dos contratos internacionais*. In CARVALHO, Patrícia Luciane (Org.). Lições de direito internacional: estudos e pareceres de Luiz Olavo Baptista. p. 91.

⁶ ARAÚJO, Nádía de. *Contratos Internacionais: Autonomia da Vontade, Mercosul e Convenções Internacionais*. p. 25. However, this author proposes a different classification than that of Pommier: “One deals with an autonomous legal branch [International Commercial Law] which touches, simultaneously, trade and industrial principles and norms of International Public Law and International Private Law, and demands an authentically international regulation. Many of these norms are solutions carved out by the international community itself and not by state authorities. Such branch encompasses, exclusively and necessarily, legal rules, but it is designed out of the experience gained in the settlement

Apart from the fact that international treaties are indeed propellers of normative and, also of contractual stabilization, one may not altogether omit the indispensability of custom as the guide of a *lex mercatoria*, to establish the profiles in which the contractual practice sits in the international level.

Hence – however advantageous the effort of recognizing a certain autonomy to international contracts – international contractualization, as an essentially private activity, is associated, to a larger extent, with a private entity, yearning to widen its performance beyond its borders.

As opposed to what is the case for States, in regards to international contracts, the private entrepreneurs were the pioneers. It comes to no surprise that international conventions have served to turn customs which have already been adopted internationally, operating between private persons, into positive law.⁷

Thus we may see how appropriate is the connection established by Luiz Olavo Baptista (2012, p. 61), between the international contractual expansion and the stamp of an order, with its own principles⁸, rooted in reiterated practice, which followed the recognition and the state protection, by means of conventional law.⁹

Principles functioned as the epicentre around which the first and strongest attempts to uniform law revolved; this is so because principles are endowed with a wide and malleable reach and may be applied in a gradual and temperate manner, in accordance with contemporary flexibility.

Baptista (2012, p.63) gives an accurate definition of *lex mercatoria*: “the ensemble of principles, institutions and rules originated from various points, and which are characterized by being inspired and aimed at relationships of operators of international trade.”¹⁰

The same author (2012, p.65) proposes that within *lex mercatoria* one finds general principles of law in the field of obligations, extracted from traditions and

of international disputes and in accordance with universal principles, such as good faith and the prohibition of unjust enrichment, whilst always seeking to find a balance between the contracting parties. A well known area of ICL [International Commercial Law] is that of international contracts [...]”. Idem, p. 309.

⁷ One may cite, among other treaties, the United Nations Convention on Contracts for the International Sale of Goods – Vienna Convention of 1980; the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, of 1986; and the Mexico Convention on the Law Applicable to International Contracts.

⁸ “The term “principle” bears several meanings. The most usual meaning is that of beginning, starting point, and in this it is faithful to its origin, given that the word comes from latin *principium*, which means that which comes first, that which is in the origin (from the same root also comes *prince*, *principal* etc). In legal science, this expression refers to general norms without the positive formality of laws, but from one deduces and applies legal rules – for example, the principle of non interference, the principle of *pacta sunt servanda*, among others. This notwithstanding, oftentimes principles may become positive law, such as the principle of good faith between contracting parties [...]. In spite of the lack of definition, scholars and operators have sought to encapsulate principles through compilations. One example is that of UNIDROIT, with principles applicable to international contracts, or that of the European Union, with the European Principles applicable to international contracts.” BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 61 e 62.

⁹ “Customs, even if made positive law by a treaty, still exist for those countries which are not part to the treaty, or yet have withdrawn from it by means of unilateral waiver”. MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. P. 88.

¹⁰ BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 63.

customs, as observed in typical contracts of international trade, in decisions of national courts on the subject, and most especially in arbitral decisions, for arbitration is the preferred mechanism of dispute resolution in the international contractual level. *Lex mercatoria*, therefore, is a reticular system, adaptable to the requirements of the post-modernist society.¹¹ Thus, *lex mercatoria* stands not in opposition to domestic law, but rather in the manner of completion:

The *lex mercatoria* is the ensemble of conduct and structure norms, or jurisdiction, and makes up the legal order. [...] Another feature of the legal order represented by *lex mercatoria* is the fact that it is made up by traditions, customs, juridical models and general principles of law, instead of rules as those of state orders.

The juridical models appear, above all, in the creation of contracts, and the traditions and customs are codified, most often, by sector.

Interpretation of contracts is made by means of general principles, as is the good faith principle, the principle of *pacta sunt servanda*, *force majeure* and others. Such principles, as explained by Eric Loquin, cannot be distinguished from those admitted in domestic law, but are a result of the convergence of interpretations and applications they receive in these systems and of the acceptance by the international trade community. In this sense the mechanics and the creation of these principles is similar to those of judicial models, traditions and customs.¹²

¹¹ The complexity of modern society and its organization in networks do not admit any longer rigid and hierarchical structures [...]. In the trade network, characteristic nowadays, the evolutionary and adaptable character of *lex mercatoria* has found its ideal *terroir*, and with its globalizing tendency, follows the path of the current economy.”BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 64 e 65. Nadia de Araújo also correlates international contracts to *lex mercatoria*: “One observes *lex mercatoria* in several manifestations: practices and customs of international trade; model contracts, as defined by the International Chamber of Commerce; general conditions for sales; general principles of law in contracts (v.g autonomy of the will of the parties, good faith and *pacta sunt servanda*); arbitral decisions. International practices and customs consist of the repetition in a constant and uniform fashion of identical acts – commissive or omissive – with a tacit consent of all the individuals who agreed upon the normative force of such acts. They are the law established by practice and which is kept active without being written, in view of a long tradition. In the practice of trade, they are seen above all in the interpretation of contracts, the *praxis* of traders. In time, these practices developed and crystallized in model contracts: standard contractual formulae designed by organizations which handle international trade, and which, however optional, for their high degree of expertise, actually constitute a form, thus bringing about clear material rules and also norms of interpretation. [...]. Arbitral practices also contribute to clarify the boundaries of *lex mercatoria*, playing a role of an almost binding case-law. Additionally, arbitration is the most frequent way to settle disputes arising from transnational contractual relationships, the arbitral clause being one of the most usual one in that sort of contracts. International contracts are typically the tool to promote international trade flows. Since they regulate multiconnected legal situations, they might relate to more than one legal order. This brings about a great uncertainty, for legal orders are not uniform”. ARAÚJO, Nádia de. *Contratos Internacionais: Autonomia da Vontade, Mercosul e Convenções Internacionais*. p. 313 a 315. For H. Patrick Glenn, UNIDROIT Principles surpass a theoretical meaning and operate as practical consubstantiation of *lex mercatoria*: : “The UNIDROIT principles go beyond the *lex mercatoria* in its historical sense, because they provide a general codification of contractual principles intended to be applied in all international, commercial (though not consumer) contracts. They provide a model for national legislators; a means of interpreting and supplementing international instruments; a compendium of ‘neutral language’ useful in drafting contracts; and a set of rules that may be used [...] in the resolution of contract disputes.” GLENN, H. Patrick. *An International Private Law of Contract*. In. BORCHERS, Patrick J.; ZEKOLL, Joachim. *International Conflict of Laws for the Third Millennium. Essays in Honor of Friedrich K. Juenger*. p. 59.

¹² BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 65.

Regarding the process of codification of customs, in a converging effort, one may find, for example, the *International Chamber of Commerce* (ICC) creating, in 1933, the Uniform Customs and Practices for Documentary Credits; and the INCOTERMS, in 1953.¹³ In this path of turning customary law into positive law, and of having *reiterated practice accepted as law*¹⁴ considered as textual command, the role of UNIDROIT stands out.¹⁵⁻¹⁶

In regards to the international contractual law, it is worth noting the UNIDROIT preparation of *Principles* (SOUZA JR, Lauro da Gama, 2008, p. 357)¹⁷:

The *Principles* mainly concern general norms regarding contracts: norms which have a common streak with the majority of legal contemporary systems and which, apart from this, aspire to provide the most appropriate solutions to the specific needs of international trade [...] Accordingly, when selecting the norms which would form part of *Principles*, one takes into account, amidst other elements, the persuasive force or its particular adequacy to the regulation of international operations, or, in conjunction, both factors.¹⁸

At this juncture, it would be relevant to note that the stabilization of the international system makes up a complex task and a extenuating effort, which cannot

¹³ Idem. p. 65 e 66.

¹⁴ Article 38, § 1º, of the Statute of the International Court of Justice.

¹⁵ "UNIDROIT's objective is to study the needs and the methods for the modernization, the harmonization and the coordination of Private Law – especially Commercial Law – among States and groups of States. Founded in 1926, as an adjuvant body of the Society of Nations, the Institute was re-established in 1940, following the dissolution of the organization, based on a multilateral agreement, the Organic Statute of UNIDROIT, approved in March 15th 1940 and amended for the last time in March 26th 1993." NETO, José Cretella. *Contratos Internacionais – Cláusulas Típicas*. p. 77. Nádia de Araújo also points to the important role of the Principles: "[...] the Principles devised by UNIDROIT are demonstrations of the international community about substantial aspects of *lex mercatoria* and they are a source of rules which might be used as guidance both to the preparation of clauses and in the moment when a dispute arises, thus aiding judges and arbitrators to find the best solution in regard to an harmonized commercial practice." ARAÚJO, Nádia de. *Contratos Internacionais: Autonomia da Vontade, Mercosul e Convenções Internacionais*. p. 316.

¹⁶ "In 1980 the International Institute for the Unification of Private Law (UNIDROIT) set up a working group to prepare a set of principles for international-commercial contracts. The working group reported in 1994 and its report was accepted by the Governing Council of UNIDROIT". FURMSTON, Michael. *Law of Contracts*. p. 29.

¹⁷ Lauro da Gama e Souza Jr. explains the acceptance of UNIDROIT Principles: "An eloquent proof of their acceptance among legal operators is the fact that, a little more than ten years after they were issued, in May 1994, almost 130 cases were compiled in which judicial and arbitral courts applied the UNIDROIT Principles. This account fails to mention the arbitration cases which were never disclosed." SOUZA JR, Lauro da Gama e. *Os Princípios do UNIDROIT Relativos aos Contratos do Comércio Internacional: Uma Nova Dimensão Harmonizadora dos Contratos Internacionais*. In. DIREITO, Carlos Alberto Menezes, TRINDADE, Antonio Augusto Cançado, PEREIRA, Antonio Celso Alves (Org.). Novas Perspectivas do Direito Internacional Contemporâneo: Estudos em Homenagem ao Professor Celso D. de Albuquerque Mello. p. 357.

¹⁸ Idem. p. 361.

be taken as a mere *transplant*¹⁹ of a norm from one context to another, neither as an artificial reproduction. Not uncommonly, when isolated from the reality in which it was originated, the norm is made *unsuitable*²⁰. Without social and institutional basis making it coherent and applicable, a norm may cease to make sense.

Despite criticisms to an exclusively mimetic behaviour, it is understandable that private entrepreneurs feel a certain discomfort when dealing with a normative plurality and seek to bring out the greatest stability to the system, in accordance with the enunciation of the minimal list of norms applicable to international transactions.²¹ Considering the little space for intervention in domestic law, one prefers to take refuge in *lex mercatoria*, forging a statute to be applicable in a distinct dimension.

2 THE DEFINITION OF THE INTERNATIONAL CONTRACT AND CONNECTION ELEMENTS – EMPIRICALLY VERIFIED INTERNATIONALISATION

The internationality of international contracts is usually expressed both in legal terms, as well as in an economical context.

Under the economic umbrella, in succinct, the international contract presupposes the international flow, translated in the cross-border movement of goods and/or of services, accompanied, in trade contracts, by the financial corresponding flow.²²

Aside the economic aspect, which is indeed factual, for the existence of an international flows is solidly verifiable, international contracts may be classified from a legal standpoint.²³ According to Battifol, (BAPTISTA, Luiz Olavo, 2012, p.23):

a contract is international in nature if the acts leading to its preparation or its execution, or the situation of the parties in relation to their nationality or

¹⁹ “[...] one jurisdiction, imitating rules or concepts of others jurisdictions, which at times is referred to as transplants [...]”. OGUS, Anthony. In.: *Competition Between Legal Systems*. In. ÖRÜCÜ, Esin and NELKEN, David. *Comparative Law: A Handbook*. p. 162.

²⁰ FOSTER, Nicholas HD. *Comparative Commercial Law of Rules or Context?* In. ÖRÜCÜ, Esin and NELKEN, David. *Comparative Law: A Handbook*. p 276.

²¹ “The plurality of rules and legal systems arises from the peculiarities of each one of the former, in which the judicial process, the way one feels and interprets the law, and the legislation also belong to each place – and the application is done by means of rules of conflict of laws pertinent to the judge and or the interpreter. These differences inexorably lead to a certain legal insecurity in international trade. [...] Normative diversification, as an element of legal and economic insecurity, has evoked constant efforts to be overcome in its effects.” BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 83 e 84.

²² Idem. p. 21.

²³ “The autonomy of the economic classification in regards to the legal one does not mean that elements of one field are not useful to the characterization in the other, according to Jacob Dolinger: “It is necessary to define an international contract and how it is distinct in regards to a domestic contract [...]. This matter has been originally dealt with by the Court of Appeals of France. In its first manifestation, in 1927, the Court ruled that one must apply an economic criterion to detect the phenomenon of a international contract, and that this would be characterized by the so-called cross-border flow and counterflow”. DOLINGER, Jacob. *Direito Internacional Privado Vol II - Contratos e Obrigações no Direito Internacional Privado*. p. 224.

their domicile, or the location of object of the contract, is connected with more than one legal order.²⁴

More than a *numerus clausus* list of interconnections possibly linking the contracting parties to legal orders elsewhere, that definition recognises the most obvious and traditional hypothesis of internationality, admitted as guides to the rules of connection.²⁵⁻²⁶⁻²⁷

Escaping from a restrictive classification, United Kingdom's *Unfair Contract Terms Act* of 1977 opens to interpretation the possibility of, depending on the case, define a contract as being international. The *Arbitration and Conciliation Act*, 1996, takes up a similar criterion, and admits, as a rule of connection, the choice by the contracting parties of a foreign jurisdiction.²⁸

In the United States, in *Bremen v. Zapata*, of 1972, the Supreme Court ruled as valid the clause of election of the English jurisdiction, deducing from it the will of the parties that the dispute be settled according to the English law. Taking into account the absence of a specific clause choosing domestic law, and given the essentially international outline of the contract, the Supreme Court interpreted as intrinsic to the parties' will that the governing law be the English law – pivotal to that conclusion was the indication of the choice of forum clause, according to which the relevant controversies to the contract would be settled in London.

Subsequently, in 1974, in *Scherk v. Alberto Culver*, the US Constitutional Court ruled some additional criteria for interpretation to be followed by lower courts, to wit: the parties' nationality and the centre of their interests; the place of negotiation; the place of signature; the place of closing; and the object of the contract. In relation to this decision (*Scherk v. Alberto Culver*), it is worth noting the *centre of interests* as the foreign element. It is precisely at this point that the traditional theory of the international contracts seems to be unjustifiably shy.

It is not unusual that the contracts closed in any given state, for the provision of services in that same place, by national legal persons, be essentially international.

²⁴ BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 23.

²⁵ "In other words, the contract is international not by virtue of a rule, but rather bears such status by virtue of a set of elements which may not be rigidly encapsulated." Idem. p. 23.

²⁶ Irineu Strenger states: "international commercial contracts are all those binding, bilateral or multilateral, manifestations connecting two or more extraterritorial legal systems, by virtue of the domicile, nationality, main place of business, place of the contract, place of the execution, or any circumstance which expresses a connection pointing towards the applicable law." STRENGER, Irineu. *Contratos Internacionais do Comércio*. p. 81.

²⁷ On the difficulty of defining in legal terms international contracts: "The exact meaning of the term 'international contract' is not always clear, but it generally refers to a contract that has links with more than one legal system. Relevant links usually include the residence and places of business of the parties, the place of conclusion of the contract, the places of performance of the contract, etc.". KRUGER, Thalia. *Étude de faisabilité sur le choix de la loi applicable dans les contrats internationaux: aperçu et analyse des instruments existants*. In. *Hague Conference on Private International Law*, 08 mars 2007. p. 9.

²⁸ José Cretella Neto reminds us that the Arbitration Act of 1959 already had a negative definition from which one could deduce the concept of international contract. This law sets the criteria of nationality and domicile, adding the choice of law or of place out of the English jurisdiction, thus differentiating domestic and international arbitration. NETO, José Cretella. *Contratos Internacionais - Cláusulas Típicas*. p. 45.

This apparent contradiction gives in when a detailed analysis is done. In fact, it is frequent to see foreign investors constituting local companies. After all, once the project is concluded, as well as the operational phase, the local entity – not the foreign one – will be that which will develop the activities.²⁹ It is equally common that, even at the preparatory stage to the operation, but yet throughout the development of the project, especially in those of great importance, there be as a requirement, the expedition of authoritative domestic acts, for example the environmental permits. These permits cannot be granted in the name of the foreign investor e must relate to the locally incorporated company.

However, the necessary capital to the enterprise is sent from the siege of the transnational company and almost always it is admitted as capital input in the newly created corporation. The *center of interests* is highlighted – not that of the place of execution of the contract, but rather that where the decision to sign it was made – as a striking feature of the international connection.

On this concentration of the decision, by which the siege of the transnational corporation is defined by its center of interests, as opposed to the place of incorporation of the subsidiary or controlled corporation, Luciano Benetti Timm states:

[...] *lex mercatoria* (and consequently commercial contracts) is made essentially by transnational corporations (many of which with headquarters in the United States) and by its major international offices, equally with headquarters in the United States.³⁰

Incidentally, it is common – for fiscal reasons – that a triangular relationship is shaped by the siege of the transnational, the locally incorporated corporation and the contracted party, with a direct dimension in which the siege pays directly to the contracted party abroad, in such a manner that the money never enters the host country.

As a corollary of these interrelational webs, it is ever more recurrent that contracts concluded in Brazil, to be performed in the country, even if the parties are exclusively local, are written in English or other foreign language, as to allow the center of interest of the transnational may legally appraise the transaction. Additionally, the use of internationally accepted contractual standards allows a greater control by the foreign investor.³¹

Therefore, the language and the choice of the contractual standard³² would be relevant indications of the contract's internationality, which would still depend of a concrete analysis.³³

²⁹ It is a consequence of the primacy of security that the local jurisdictional bodies may reach the operating company, as well as its assets; which would be made extremely difficult, should the operation by a foreign entity be admitted.

³⁰ TIMM, Luciano Benetti. *Common Law e Contract Law: Uma Introdução ao Direito Contratual Norte-Americano*. p. 13.

³¹ In practical reality, local in-house lawyers or law firms which counsel them have limited autonomy and the modification or any adjustment in clauses considered to be sensitive in international standard models depend on the approval of the headquarters.

³² “In international contracts, there is a wide practice wherein recourse is made to preset formulae or general conditions, where there is always the stipulation of the applicable law. The contracts of *Grain and Beef Trade Association* – Gafta, for example, subject the parties to arbitration in England, and the

In Brazil, art. 9 of Decrete-Law No. 4.657, of September 4th, 1942, sets forth a *lex loci contractus* rule, to wit, the place where the contract was concluded or that where the offer was made, as to define the law to which the contract shall be connected. This criteria does not disregard the autonomy of the will of the parties, once they could choose to conclude the contract where they deemed best, thus establishing, in accordance with Brazilian law, the necessary connection with the intended law. Only for the sort of contracts which require an essential formality a stricter criteria is required, thus prevailing the place of the performance of the obligation – *lex loci executionis*.

More than an indirect statement, art. 9 of Decrete-Law No. 4.657, when constructed in a harmonized fashion with the constitutional imperative of freedom, provides for the possibility of the parties expressly choosing the applicable law to any given contract.

Therefore, it is not required that the contracting parties physically dislocate to the chosen place, which would be an unnecessary burden. It is sufficient that they indicate in the contract which legal order will be applicable.

For Lauro da Gama e Souza Jr. (2008, 620), since art. 9 of Decrete-Law No. 4.657, which he deems to be an *implicit legislative clause*, sets forth no prohibition, one may deduce from it an ample exercise of autonomy of the will of the parties and the possibility of choosing the law applicable to the contract:

In a nutshell: the *constitutional filtering* of art. 9 of Decrete-Law No. 4.657 excludes, for considering it unconstitutional, the prohibiting condition of choosing the applicable law to the contract, since it is at odds with the fundamental freedom granted by art. 5º, §2º, of the Constitution. And, more than that: it objectively assures the validity and efficacy of the

contract to the English law. The same occurs with contracts concluded according to the formulae of the *London Rubber Trade Association*, of the *Incorporated Oil Seed Association*, of the *London Rice Brokers*, of the *Liverpool Copra Association*, of the *American Spice Trade Association* – Ast; references to German law are recurrent in the transport contracts for German ship-owners, and the general terms of sale to foreign countries of the Krupp industries (*Friedrich Krupp Germanianweft A.G., Kiel-Garten*) also stipulate the submission to German law.” BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 51. It is clear that many of the contractual *standards* have an intimate relationship with a given legal order. For example, this was the case of the *Americanized Welsh Coal Charter* (AMWELSH) – the model adopted by the *Baltic and International Maritime Council* (BIMCO) for the freighting of coal transporting shipments. This model was created as from the adaptation brought into light by the *Association of Ship Brokers & Agents in New York*, the model indicated by the BIMCO. It gained such relevance in this field that BIMCO went on to recommend this contract as the standard for the coal freight originating or destined for the United States. It seems obvious that, in the case of omission by the parties, the interpreter considered the law of New York as applicable to this contract. The AMWELSH is an example, amongst countless ones, which resulted from the standard formulae applied to by international associations. For a more detailed analysis of the AMWELSH model, a reading of the *Explanatory Notes*, devised by BIMCO and available at their website <https://www.bimco.org/> is recommended.

³³ As additional elements, and beside the traditional ones, appointed by Battifol, one admits the place of payment and the jurisdiction chosen by the parties. In this sense, José Cretella Neto summarizes the following elements of connection: the contracting person (nationality or domicile); object of the contract (preparation or execution); currency; flow of goods; cross-border nature; sort of commercial relation; treaties; uniform law. NETO, José Cretella. *Contratos Internacionais - Cláusulas Típicas*. p. 45.

parties' choice, within the rules of private international law, by means of an implicit legislative clause, instrumental to the constitutional protection of freedom [...]. The reasoning behind this is simple. On the one hand, constitutional protection of freedom impedes that an amplifying construction of art. 9º of Decree-Law No. 4.657 reduces the ambit of party autonomy in contracts, thus establishing a non-existent restriction in terms of positive law. On the other, the objective and radiant efficacy of the constitutional clause of freedom [...] constitutes a particular right against the State so that the State does not impede actions and omissions – a sort of the self-determination right of the individual. This efficacy authorizes, therefore, interpreters and those in charge of applying the law to extract total effects from the choice of law made by the contracting parties, even if there is no express legal provision about it.³⁴

Thus, the main feature of party autonomy is permitting that parties themselves chose the law of the contract, which entails a greater degree of security in the contractual relationship.³⁵

The French Court of Appeals has also given privilege to private autonomy by ruling that the law applicable to the contract is the law chosen by the parties. Only when there is no express declaration of the parties should the interpreter investigate the economics and circumstances behind the contract and deduce within which law the relationships emerging from a given contract falls.³⁶ In the absence of an unequivocal manifestation, one would take refuge in elements which might indicate the will of the parties, such as language, *lex fori* among others.³⁷

Against this background, it seems to be adequate to consider a contract as being *international* when *lex mercatoria* typically does so by means of granting it with a particular regulation, based in international commercial practices.³⁸

³⁴ SOUZA JR, Lauro da Gama e. *Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro: uma leitura constitucional do artigo 9º da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável*. In: TIBURCIO, Carmen e BARROSO, Luís Roberto (Org.). *O Direito Internacional Contemporâneo: Estudos em Homenagem ao Professor Jacob Dolinger*. p. 620.

³⁵ “Operators of trade law aim at obtaining certainty and security, which in this imperfect environment it is not possible. One of their escape routes towards a safe legislative harbour is the choice of the applicable law, whose consequences may vary; and they reach it by means of the so-called autonomy of the will. The procedure of experienced operators is a good contract, carefully written, and which should be stuck, like an oyster to the hull, to a favourable legal order, always having in mind not to serve oneself of it”. BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 46.

³⁶ *Idem*. p. 47 e 49.

³⁷ In regards to express choice, this liberty is not exercised, in the greater part of legal orders, in an unrestricted manner; it is necessary to prove that the contract bears, indeed, some connection with the chosen order. One seeks, thus, to avoid evasion of law, which occurs whenever the contracting parties choose a different law than that one would assume to be applicable, so as to defraud an imperative command of a jurisdiction. In this case, the choice of law would not be the manifestation of the will of the parties to subject the contract to a specific law, but rather the will to illegally defraud an imperative norm, which no legal order should allow.

³⁸ “Whenever handling international contracts, the judge or the interpreter takes (or should take) into account that these agreements, although subjected to the laws of one country, have features which do not correspond exactly to the contracts concluded to have effects solely inside the country.” BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 174.

The immediate effect of classifying a given contract as international would be to force a judge or an arbitrator to interpret it in accordance with a particular hermeneutics and *lex mercatoria*.

According to Heleno Taveira Tôres (2013, p. 100):

Whenever two contracting parties, by means of a free and non violent will, seek to set the terms of a contract involving foreign elements corresponding to more than one jurisdiction, a international contract come to the fore. **That fact alone differentiate this contract from others, justifying an specific model of hermeneutics and regulation.**³⁹ [highlighted]

In Brazil, for instance, where no convention of international *lex mercatoria* has been ratified, **this is not enough to avert the interpreter's duty of setting a special hermeneutics, bearing in mind the valorative link between the cause of the contract and all elements which legally characterize it, thus accommodating it in a regime compatible with its circumstances, in the face of the distinct foreign elements involved.**⁴⁰ [highlighted]

Even if the parties chose domestic law to be the rule of the contract, its international character may persist, should *lex mercatoria* grants it with a particular regime. The will of the parties – referring to domestic law – and the principles of *lex mercatoria* should interact in a conciliatory way. Such harmonization is described by Lauro da Gama e Souza Jr. (2008, 626) with a metaphor of a *dialogue of sources*:

Bringing theory and practice together, as exemplified above, in the case of an international contract of agency (commercial representation) in which French law has been chosen, a judge may not disregard the private autonomy of the parties. But he should also establish a dialogue of sources, justifying his solution through the domestic law chosen by the parties by means of internationally known rules, such as UNIDROIT Principles [...]. Notwithstanding the parties' right to chose, whoever is in charge of applying the law, in a concrete case, must mitigate the notion of exclusion, inherent to the classic conflict technique of private international law and face the challenge of harmonizing and coordinating several applicable legal rules, thus establishing, by means of a dialogue of sources, a flexible and useful coordination between them, which might entail the best possible solution for the complex cases of international trade.⁴¹

José Luis Siqueiros (2006, 563), investigating the role of UNIDROIT, emphasizes that the *Principles* of that institution, by proposing new rules for the

³⁹ TORRES, Heleno Taveira. *O Dever de Respeito às Qualificações como Medida de Proteção à Segurança Jurídica Internacional – Um Caso: Contratos de Produção e o Modelo Turnkey à Luz do Direito Brasileiro*. In. TORRES, Heleno Taveira (Org.). *Comércio Internacional e Tributação*. p. 100.

⁴⁰ Idem. p. 101.

⁴¹ SOUZA JR, Lauro da Gama e. *Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro: uma leitura constitucional do artigo 9º da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável*. In. TIBURCIO, Carmen e BARROSO, Luís Roberto (Org.). *O Direito Internacional Contemporâneo: Estudos em Homenagem ao Professor Jacob Dolinger*. p. 626.

internationality of contracts, step away from traditional criteria and bring the international nature of contracts closer to *lex mercatoria*:

UNIDROIT Principles set forth general rules designed for international trade contracts. The Principles do not expressly adopt any of the criteria developed within international law in regards to internationality. For UNIDROIT there exists the presumption that said concept applied to contracts must be constructed in the widest possible way, so as to exclude from said classification only those contractual relationships which lack any element of internationality, *i.e.*, when all transcending elements of the contract are connected with one single nation.⁴²

Evidently, this framing bears a negative nature. Thus, only when the contract is entirely characterized by elements connected to one single legal order it is to be considered *national*; in all other cases, when any element is foreign, the contract is to be considered *international*.

Hence, one has a new proposal for classification, by which the elements of connection would facilitate the interpreter's role of assessing the internationality of a contract; the international legal order (*lex mercatoria*), nonetheless, must recognize that contract as being *international*.

3 THE INTERNATIONAL CONTRACT AS SOCIAL FACT

A contract carries out a stabilizing function, overcoming individual voluntarism and providing for the circulation of wealth⁴³. Characterized as a legal act, by means of which parties regulate reciprocal relationships, a contract reflects the private autonomy and stands as a true tool of self-determination⁴⁴. Thus, a defect of consent, which disfigures the volitional essence of a contract, nullifies it.

Internationally, given cultural, social, economic and legal differences, distrust tends to be greater than observed in a particular country. Hence, the contract is seen as a fundamental tool to building the international system.

On the other hand, the exercise of the said contractual freedom takes place in two main dimensions: freedom to contract with whoever, and freedom to contract under the best fitting conditions.

⁴² “The UNIDROIT Principles are aimed at establishing general rules conceived for international commercial contracts. These principles do not adopt any of the internationality criteria, formulated in the ambit of conventional law. For UNIDROIT there exists the presumption that the referred concept [of internationality], when applied to contracts, must be interpreted in the widest sense possible, so as to exclude from such classification just those contracts which do not have an international element, or rather, when all of such elements of contract establish a connection with just one state.” SIQUEIROS, José Luis. *Los Neuvos Principios de UNIDROIT sobre Contratos Comerciales Internacionales*. In TIBURCIO, Carmen e BARROSO, Luís Roberto (Org.). *O Direito Internacional Contemporâneo: Estudos em Homenagem ao Professor Jacob Dolinger*. p. 563.

⁴³ TEPEDINO, Gustavo (Coord.). *Obrigações: Estudos na Perspectiva Civil-Constitucional*. p. 55 e 59.

⁴⁴ NETO, José Cretella. *Contratos Internacionais - Cláusulas Típicas*. p. 71.

Western democracies, especially following the defeat of Nazi-Fascism in 1945, and in response to the communist expansion, have been committed to implementing legal orders oriented at mitigating imbalances, thus overcoming the notion that the State should carry out only a negative role, which had been developed during the French Revolution.⁴⁵

Individual liberties, including contractual liberty, were ever more seen as necessarily bound by legal imperative rules, in such a manner as to prevent that the postulate of freedom to contract resulted in the enslavement of the weaker contractor.^{46 47}

The regulatory action of the State took refuge in the flexibilization of the primitive concept of the *relativity of contracts*: one may state, as well, that by recognizing that contracts mean a social fact *per se*, affecting directly or indirectly third parties, it was possible to reduce the latitude of private autonomy (PEREIRA, Caio Mário da Silva, 2006, p. 13)

[...] the most modern meaning of the role of contracts, which is not that of exclusively serving the interest of the contracting parties, as if it had an autonomous existence, outside the world that surrounds it. Nowadays a contract is seen as part of a greater reality and as a factor which alters social reality. This statement brings as consequence, for example, that third parties who are not properly parties in the contract may influence it, for they are directly or indirectly impacted by it.⁴⁸

This ability to influence social reality – and not only the legal one – sets forth an understanding of the contract as a social phenomenon. After all, every legal act is, above all, a social fact, because that dimension pertains to no other than to the universe of human relationships.⁴⁹

One of the milestones of the flexibilization of private autonomy is exactly the social function of contracts. Thus, the notion that a contract must ultimately attenuate imbalances, and not create more distortions, gains ever more strength. Just as art. 5, indent XXIII, of the Brazilian Constitution imposes the social function as limiting

⁴⁵ On the long way from classic liberalism to the modern interpretation of private autonomy, in particular in the United States: "For half a century ending in the late 1930s, the Supreme Court invalidated, although fitfully, a number of state and federal statutes regulating economic activity, on the ground that restrictions on liberty of contract, to be consistent with due process, must be justifiable on the basis of classical economic theory [...]." POSNER, Richard A. *Economic Analyses of Law*. p. 881.

⁴⁶ "In modern world, we feel an overwhelming need of the State to intervene in the contractual order, as to this order does not become an instrument of enslavement. This intervention, by means of public order norms, avoids imbalances". AZEVEDO, Álvaro Villaça. *Teoria Geral dos Contratos Típicos e Atípicos - Curso de Direito Civil*. p. 12.

⁴⁷ On the modern understanding of private autonomy, Fábio Ulhoa Coelho states: "The notion of private autonomy was developed as an attempt to make compatible a twofold phenomena: on the one hand, the recognition of the power of legal subjects of disposing of their own interest in a legally bind way; on the other hand, the limitations imposed by the necessity of protecting the weaker contracting party". COELHO, Fábio Ulhoa. *Curso de Direito Civil, Vol III*. p. 37.

⁴⁸ PEREIRA, Caio Mário da Silva. *Instituições de Direito Civil - Contratos, Vol III*. p. 13.

⁴⁹ On the impossibility of separating the practical, economical and legal aspects, Luiz Olavo Baptista states: "In sum: the international contract, being an international economic transaction (and, hence, a means of promoting the circulation of wealth among nations) is nevertheless a legal concept". BAPTISTA, Luiz Olavo. *Contratos Internacionais*. p. 29 e 30.

property, the Civil Code sets that the liberty to contract will be exercised in virtue of, and in accordance with, the limits of the social function of the contract.⁵⁰

It is by a systemic construction of the Brazilian legal order and, especially, of the Civil Code, that one deduces the legislator's impetus to have the social function of the contract considered as a core principle, legitimizing contractual liberty. In this matter, the social function presents itself as foundation of public order (COELHO, Fábio Ulhoa, 2012, p. 50):

The function referred to by the law limits the liberty to contract, in the sense of invalidating contracts that do not fulfil it. So much so that, in a transitory rule, the Code considers that a contract deprived of social function is void, for contradicting as public order norm (art. 2.035, Single Paragraph of the Civil Code).⁵¹

Such is the crucial extent of this subject that, contrary to what happens with good faith, which, when contradicted, affects mainly the private relationship in the contractual domain; the contradiction to the social function of the contract entails the invalidity of the legal act.⁵²

4 THE PUBLIC ORDER – THE PARADIGM OF CONTROL

In domestic law, public order operates as a principle which limits the will of the parties, thus impeding that private entities set obligations in a way which is contrary to it. In international law, public order may hinder the use of foreign laws; the enforcement of judgments passed abroad; and the recognition of acts which have taken place in other countries. It is precisely in regards to this last effect that public order relates to international contracts.⁵³

Jacob Dolinger adequately points out that public order does not bear a legal dimension alone. The principle of public order, in a wide meaning, is also philosophical and moral. Thus, public order is calibrated by the mindset and the average sensibility of a given time.⁵⁴

In Brazil, article 17 of Decree-Law No. 4.657, of September 4th, 1942, equates public order to good costumes. Despite the tautology of defining one concept by another equal one, by doing so, the Brazilian legislator has strengthened the moral component of public order.

Since there is no stability in morals, it follows that public order is relative in time and space.⁵⁵ Dolinger points out this instability as being the defining feature of public order:

⁵⁰ “Art. 421. The liberty to contract shall be exercised in view of, and in the limits of, the social function of the contract”.

⁵¹ COELHO, Fábio Ulhoa. *Curso de Direito Civil, Vol III*. p. 50.

⁵² Idem. p. 51.

⁵³ DOLINGER, Jacob. *Direito Internacional Privado – Parte Geral*. p. 385 e 386.

⁵⁴ Idem. p 386.

⁵⁵ “[...] what is to be understood by public order in a given time, including its conceptual meaning, varies in time and space.” MIRAGEM, Bruno. *Conteúdo da Ordem Pública e os Direitos Humanos -*

Given that the concept of public order emanates from *mens populi*, one understands that it is relative, instable, varying in time and space. Inasmuch as the concept of public order is not identical in different countries and regions, it is also not stable, and is altered in accordance with the evolution of social phenomena within each region.⁵⁶

As a result of such instability, public order relates to *contemporaneity*: since public order is relative, he who constructs it should appraise the fact in conformity with morals applicable at the time of judgment, and not at the time of the fact. To the extent public order follows a path to a greater liberality, past acts, committed under the aegis of past morals, when the legal order of the place of judgment would have not permitted, will be recognized, should a new morality emerge. Similarly, if morals have become more stringent, the act – until then recognized – will be refuted.

The perception that one single conduct may or may not be classified as violating public order, depending on the degree of offense to a moral command, breaks through the strict segmentation which proposed to classify norms as *public order* or *current*.⁵⁷

This was exemplified by Dolinger, according to whom a foreign norm by which a 10-year old child is considered to have civil majority potentially violates the Brazilian public order and therefore should be rejected; whilst a foreign norm by which a 16-year old teenager is considered to have civil majority should be accepted, in spite of the fact that both of them contradict the same legal rule – that by which capacity for civil acts is only obtained at the age of 18 (2003, 386).

Thus, it is indispensable that a conduct which is potentially at odds with public order be appraised not in an objective manner, but rather taking into account a gradation by which one qualifies whether that conduct is truly unacceptable to that society⁵⁸. One understands therefore that the moral dimension referred by Dolinger may not be separated from public order.

Elementos para um Direito Internacional Pós-Moderno. In: MARQUES, Claudia Lima (Org.) e ARAÚJO, Nadia de (Org.). *O Novo Direito Internacional: Estudos em Homenagem a Erik Jayme*. p. 313.

⁵⁶ DOLINGER, Jacob. *Direito Internacional Privado – Parte Geral*. p. 389.

⁵⁷ “Valery used to say that public order laws are nothing but imperative and prohibitive laws. Antoine Pillet wrote that in International Private Law one must distinguish between law which are concerned and laws which are not concerned with public order. Hence the effort of European scholars to enumerate and classify cogent domestic laws, public order laws, which could not be replaced by laws of other jurisdictions. It was Etienne Bartin who diverged of the classification of laws, pointing out that the same law may sometimes be characterized as public order and sometimes that will not happen”. *Idem*. P. 390.

⁵⁸ Izabel de Albuquerque Pereira’s exposure of ideas is crystal-clear, in relation to which in this work we need not make further comment: “Scholars often equate the expression of public order to the expression of the law of public order, when faced with the topic of conceptualization of public order, which, in turn, would be taken for the idea of imperative laws. [...] Despite such ideas by these distinguished jurists, it seems to that saying so is manifestly wrong, considering that, in fact, the mere naming of a legal norm as public order is deprived of a proper legal technique, the reason being that public order is not an endogenous phenomenon to the norm, but a principle which inspired the legislator to redact such imperative laws, and that, therefore, cannot be mistaken with them, once it foregoes them and acts as a foundation of the legal order.” PEREIRA, Isabel de Albuquerque. *A Ordem*

5 CONCLUSION

Individuals take refuge in stabilizing devices, such as essentially international contracts, as a result of the increase in modern life complexity.

Against this background, reference to classic elements of *internationality* does not seem to suffice, neither to frame contracts as being *international*, nor to bear the resulting consequences.

However timidly, and in line with UNIDROIT principles, scholars have considered that the defining feature of contract internationality lies in the treatment specifically given by *lex mercatoria* and in the recognition of international contracts as an essentially international act; it thus emerges that the duty of constructing such contracts in accordance with a sort of hermeneutics which is different from exclusively local principles.

Doubtlessly, the public order would still function as a shield to control the efficacy of the international legal transaction and the possible admittance of its effects in the national level which does not affect the international essence of the act.⁵⁹

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